Report

by the

Automobile Accident Compensation Committee

BRITISH COLUMBIA
1983

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Report by the

Automobile Accident Compensation Committee

British Columbia 1983

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Preface

This report is about the compensation British Columbians receive if they are injured in an automobile accident, particularly if they are the victim of a serious injury. Damage to automobiles and other property is dealt with only when it relates to our primary topic.

The report presents the views held by the majority of the members of the Automobile Accident Compensation Committee, except where it is noted otherwise. This is an independent committee, and our opinions and conclusions are not necessarily the same as those held by the companies, professional bodies, or organizations with which we are individually associated.

Although our mandate calls for us to report our findings to the President and Board of Directors of the Insurance Corporation of British Columbia, we have written this report with a wider readership in mind because of the public importance of our subject. Thus, we have chosen to use the ordinary meaning of most words wherever possible. To clarify how particular terms may differ from their purely legal or technical connotation, please refer to the Glossary. Similarly, readers should refer to pertinent legislation to clarify any questions they may have about specific legal interpretations.

We wish to acknowledge three people without whose work and dedication this report would not have been possible: Marje Fayen, who faithfully recorded the voluminous minutes of all of our meetings and assisted us in countless other ways; Guy Cloutier, who provided the committee with excellent background information, including actuarial and statistical analyses, and helped research and plan the

report; and Gareth Sirotnik, who organized and wrote the report, working closely with all of us.

Finally, we wish to give special recognition to the people whose experiences led to our committee being established in the first place—the victims of automobile accidents. We hope our work helps bring about changes that ease the burdens to be faced by accident victims of the future.

Summary

Readers planning to review the complete report may wish to pass over this section and go directly to the Introduction. The Summary recapitulates the main points and recommendations put forward by the majority of the committee. Minority views are included in the body of the report.

Introduction

The Automobile Accident Compensation Committee is an independent committee. It was set up by ICBC in 1979 in response to growing concern by the corporation's Board of Directors that the compensation system for bodily injury may, by its very nature, produce injustices for the victims of automobile accidents, especially those seriously injured.

The committee's mandate was to review the present compensation system and recommend ways to improve it at no substantially greater cost to the motoring public.

The Present System

The present system for compensating automobile accident victims is the product of two systems: tort law and insurance.

THE FAULT SYSTEM

Since the 19th century, determining liability for causing an accident has required a proof of negligence under tort law. Commonly called the fault system, tort law places the onus on the injured party to establish that the alleged wrongdoer

is liable because he or she was negligent. Reflecting national trends, the B.C. government has modified various laws over the years to make it somewhat more certain that victims recover compensation under the fault system.

In a precedent-setting "trilogy" of decisions rendered in 1978, the Supreme Court of Canada established specific guidelines for determining a fair level of compensation for innocent victims of automobile accidents. This definition also included a ceiling on the amount awarded for non-economic losses, such as pain and suffering.

AUTOMOBILE INSURANCE

Excluding property damage, B.C.'s automobile insurance covers two kinds of risks: the risk of liability for causing injury and the risk of injury itself.

Following the report of a Royal commission, the provincial government introduced compulsory liability insurance for all motorists and provided limited accident benefits payable to all victims regardless of fault. This 1969 reform followed a number of largely unsuccessful attempts to protect people from uninsured or underinsured drivers. The two types of insurance made compulsory at that time (third-party liability and first-party no-fault accident benefits) were continued when the Crown corporation ICBC was set up in 1973.

THE COMPENSATION PROCESS IN B.C.

The compensation process for innocent victims almost always consists of five steps and sometimes a sixth: notice of claim, verification of coverage, interim compensation, investigation, negotiation and settlement, and legal action and settlement.

Traditionally, lawyers charge for their time primarily on the basis of an hourly fee plus expenses. Since 1969, B.C. lawyers have also been permitted to charge on the basis of contingency fees, whereby a lawyer agrees to accept a case and charges a fixed percentage of the amount awarded, i.e. only if the case is successful. This practice is now followed in most automobile liability cases. The court also awards the

winning side something called party and party costs, but these no longer represent a significant portion of the actual legal costs involved in a case.

The Purpose of Compensation

The committee believes that *the compensation system's fundamental purpose should be to provide persons injured in automobile accidents with a security of just compensation for the economic losses they suffer*. The committee has singled out six criteria which we believe must be satisfied to achieve this fundamental purpose for compensation:

ADEQUACY
Indemnity should adequately compensate victims for economic losses so that neither they nor their families suffer unduly.

TIMELINESS
Victims should receive necessary assistance as soon as possible following an injury and should receive future compensation as they are entitled to it, without delay.

EFFICIENCY
The compensation system should operate in an economically efficient manner, delivering the maximum reparation possible from the funds available.

EQUITY
All victims should be compensated proportionately according to their economic needs, but some advantage should be accorded to innocent victims when compensating non-economic losses.

COMPASSION
Victims should receive humane, caring treatment in whatever ways they come in contact with the compensation system.

INTELLIGIBILITY
The system should be clear enough so that the public can understand it in theory and victims can cope with it in practice.

In arriving at these criteria, we examined several other aspects which are sometimes also considered essential to the compensation system, but which we think are not necessarily so.

The committee believes that the right to sue for economic losses is not, in itself, an essential feature of a just compensation system, and that the security of compensation for these losses is, ultimately, more important. If the right to sue is replaced with a more important right—the guarantee of compensation—the exchange is an acceptable one.

Retribution and deterrence are two other aspects often mistaken as criteria for the compensation system. Wrongdoers are not really punished by the fault system because liability insurance protects nearly all of them from paying for the losses they have caused. In any case, retribution against wrongdoers does not provide compensation for a victim's real losses.

The fault system does not act as a deterrent to dangerous driving because liability insurance takes away the deterrent. Also, a useful deterrent must affect large numbers of people, not just those few involved in injury-causing accidents. For this reason, insurance premiums (which are tied to fault for all kinds of accidents) do act as a deterrent. Harsher penalties and stricter enforcement of driving regulations are probably the most immediately effective deterrents, but there are limits to which society is willing to make penalties and enforcement more severe. Education is perhaps the most important method of changing driving behaviour, but requires a long-term effort.

Evaluation of the Present System

In judging the present system on the above criteria, the committee's main conclusions are as follows:

ADEQUACY

The present compulsory liability limit of $100,000 does not cover the needs of the seriously injured victims of either

hit-and-run drivers or underinsured motorists. Most motorists, however, carry higher optional limits.

Liability awards often do not match a victim's needs because the damages, paid in one lump sum, must be determined before most of these needs occur.

Present no-fault accident benefits are very inadequate, but were intended only as moderate compensation for wrongdoers and as interim compensation for innocent victims pending resolution of their liability claim.

TIMELINESS

Delays creating hardship and anxiety are inherent in the fault system because (except for very limited no-fault benefits) compensation is not provided automatically when needed, but only after liability is determined.

Delay is also a tactic employed, justifiably or not, both by insurers and victims' lawyers. Lengthy court backlogs are now common.

Advance payments to victims, made against their likely liability settlement, are not being provided frequently enough.

Since awards are made in one lump sum, there is a possibility of squandering, mismanagement, or misuse of large compensation awards. But squandering by seriously injured victims does not appear to be a common problem.

EFFICIENCY

Although only a small number of lawyers are unconscionably abusing the contingency fee system, all legal costs detract seriously from an individual victim's compensation since the costs are subtracted from the amount a court determines the victim needs.

Legal and other costs associated with the adversary system also deplete the system as a whole, taking from the overall insurance fund a large amount of money which could otherwise provide for victims' needs.

The fund is also depleted by the tendency to overcompensate the large number of minor injuries with unjustifiably large settlements for pain and suffering in order to reduce the

number of time-consuming cases, the likelihood of legal action, and associated costs.

EQUITY

The fault system operates somewhat like a lottery. Despite a given victim's needs, the amount the person receives often depends on outside factors, such as how much liability coverage the wrongdoer carried, and various unpredictable factors such as the disposition and skill of lawyers, judges, juries, witnesses, and so on. These factors produce inequities between awards for similar injuries.

Wrongdoers who merely commit an error of judgement or have a moment of inattention are as ineligible for adequate compensation as those guilty of more serious negligence. Innocent families also suffer unfairly when a head of household is ineligible for adequate compensation.

COMPASSION

Seeking compensation in the adversary environment of the fault system is inevitably a stressful experience for accident victims. Dealing with a large bureaucracy exacerbates the situation.

Lawyers may prepare their clients inadequately for the gruelling process many must go through.

After going through the legal process, innocent victims commonly say they feel they were treated as if guilty.

The process, however, is inherently no more severe under government-operated insurance than under private insurance. But the frustration of fighting an experienced insurance company is compounded because in a monopoly situation victims are opposed by their own company.

INTELLIGIBILITY

Most people seem to understand the fault system as it affects property damage claims, but they wrongly assume they are fully covered for their own bodily injury.

Because it is a Crown corporation, most people expect ICBC to act like a social agency, rather than a normal insurance company acting in defence of the wrongdoer.

PUBLIC ATTITUDES

The committee sponsored three surveys of public attitudes about compensation. The committee's principal interpretations of the results are as follows:

- The present system is widely misunderstood, and public opinion must be interpreted within the context of that misunderstanding.
- The public does not understand that many of the aspects they do not approve of in the compensation process are an outcome of the fault system itself.
- Economic security is considered the principal purpose of compensation.
- The public believes there should be some distinction between types of guilt, not realizing that the fault system makes no such distinction and treats those who have committed a minor indiscretion as harshly as those guilty of gross negligence.
- A survey of severely injured victims showed no evidence of their commonly squandering their large awards.

Alternative Systems

Under a no-fault system, compensation is provided without regard to fault, at least for economic losses. Drivers, however, can still be convicted of breaking laws, and the fault principle itself may still be applied for insurance rating and liability for property damage.

Some no-fault jurisdictions compensate non-economic losses (such as pain and suffering) based on a fixed scale, while others allow tort action—but only in those cases of serious injury that exceed a specified threshold of damages.

Support for no-fault automobile insurance has grown since it was first proposed in the 1930s. A number of jurisdictions have adopted various forms of no-fault. B.C. has limited no-fault benefits, but not a true no-fault system in which tort action is eliminated and replaced by assured compensation.

No-fault represents a different concept of responsibility for automobile accidents. Driving is seen as inherently risky and accidents as inevitable, primarily because of human error. Therefore, the no-fault system does not address itself to causes nor to determining fault, but solely to providing compensation.

Recommendations

Recommendations (in italics) are followed by additional comment.

EXTEND NO-FAULT BENEFITS

Economic losses suffered by automobile accident victims should be compensated exclusively on a first-party basis so that the needs of victims will be provided for without regard to fault.

Third-party liability insurance, designed to protect wrongdoers from the financial losses resulting from liability, does not adequately satisfy what has now become society's fundamental priority for automobile accident insurance—secure and just compensation for the economic losses suffered by victims. The risk of injury and suffering from motor vehicle accidents has become so pervasive that individuals need adequate protection through a form of adequate first-party insurance. To accomplish this, it is necessary to redirect funds—some of which are now consumed in the adversary process and some in providing for certain non-economic losses—into compensation on a no-fault basis for all victims.

Care and rehabilitation

The cost of care and rehabilitation should be removed from tort, and all reasonable requirements for this care should be provided to all automobile accident victims.

There is a fundamental obligation to care for fellow citizens injured in automobile accidents. Victims should receive adequate compensation for all care and rehabilitation expenses when and as they require them, according to the facilities available at the time. If these benefits

are made unlimited, there is no need to require tort action to obtain them.

Income loss

Indemnity for loss of income should be removed from tort, and all automobile accident victims should receive adequate replacement for lost income up to a maximum level which would cover the income of at least 80 percent of the British Columbia population.

The payments for this income replacement and the maximum level provided should both be adjusted annually to reflect increases in the cost of living and in the average B.C. wage. Those with higher incomes should be permitted to purchase supplementary no-fault protection for their income loss in excess of the maximum level provided under this basic plan.

Neither victims nor their families should suffer personal privation due to lost income, whether or not they have other disability coverage. The basic level of indemnity should cover the needs of the large majority of people. It is incumbent upon the wealthier individuals in society, who can afford it, to pay for additional coverage to protect their higher levels of potential income loss.

Survivors' benefits

Indemnity for the economic losses suffered by the spouse and the dependants of victims killed in automobile accidents should be removed from tort and should be provided exclusively on a no-fault basis. The basic indemnity would be related to what the deceased victim's income was; however, additional levels of indemnity could be purchased on a no-fault basis. Survivors should also receive some form of lump sum benefits, similar to that currently provided under Part VII of the Autoplan regulations.

If a victim later dies from causes unrelated to an accident, the person's benefits should cease and not then accrue to surviving dependants, because these benefits are intended solely to compensate for losses from an automobile accident.

Under the Family Compensation Act, only an innocent victim's surviving spouse and dependants may sue

for strictly economic losses. Under the proposed system, the dependants of all deceased victims would be compensated regardless of fault.

Arbitration and appeal

Disputes between the corporation and claimants should be settled through the type of arbitration process commonly included as a clause in most insurance policies. Both parties would appoint an arbitrator to act on their behalf. These arbitrators would, in turn, select an umpire to reach a final decision, if they were unable to do so. This final decision could be appealed to the courts.

There must be a form of checks and balances to ensure that all victims receive the compensation due to them. The arbitration process should settle minor disputes swiftly and economically, leaving only a few cases that might end up in court.

RETAIN TORT FOR NON-ECONOMIC LOSSES

Victims of automobile accidents should continue to have the right to sue wrongdoers for non-economic damages, but the right should be restricted (by way of a "verbal threshold") to only those victims who suffer serious injury.

Non-economic losses include a victim's pain and suffering or loss of amenities resulting from an accident. Because these losses are abstract and difficult to measure, it would be proper to leave the adjudication of them to the courts. Economic losses can be fairly calculated through the mechanisms of the insurance system, but determining non-economic damages requires a degree of judgement the legal system is best qualified to administer.

Although the public appears to favour the protection of all victims from economic privation without regard to fault, the public also favours that some advantage be given to innocent victims. While not compromising the security of compensation for the economic losses suffered by all victims, such an advantage for innocence can be preserved, by continuing to allow only the innocent the right to sue for non-economic losses.

A threshold would enable the insurance fund to compensate economic losses of all victims on a no-fault basis by restricting the recovery of non-economic losses to more serious injuries only. The money paid out for pain and suffering in the large number of insignificant or relatively minor injury cases should really be directed to the benefit of more seriously injured victims.

INTERIM MEASURES

Since it is unlikely that the major changes we are recommending would be instituted in the immediate future, a number of interim measures should be taken to ameliorate some of the problems of the present system as soon as possible. It is important to note that these measures will not rectify all of the problems since this is impossible within the confines of the fault system. Furthermore, covering the cost of some of these measures may require an increase in insurance premiums. Our interim recommendations are summarized below.

ADEQUACY

Minimum liability limits

The present third-party minimum liability limit should be increased from $100,000 to somewhere in the range of $300,000 to $500,000.

Accident benefits—care and rehabilitation

The present limit of $100,000 on no-fault care and rehabilitation benefits should be eliminated so that there will be no dollar limit on these benefits.

Accident benefits—weekly indemnity

The limit on no-fault weekly disability payments should be increased as much as possible in proportion to the increase in average British Columbia incomes since the benefits were first enacted.

Accident benefits—death benefits

Death benefits should be increased as much as possible in the same proportion as recommended for weekly indemnity benefits.

Accident benefits—disputes

The same method for resolving disputes that the committee recommends be adopted in a new compensation system should be adopted as an interim measure for resolving disputes arising out of current Part VII no-fault accident benefits.

TIMELINESS

Advance payments

The corporation should reaffirm its policy and increase its practice of providing advance payments to help meet victims' needs prior to the settlement of liability claims. As a legislative encouragement for advance payments, Section 24 of the Insurance (Motor Vehicle) Act should be amended so that courts are provided with the authority to deduct advance payments from liability awards and to take them into consideration when determining pre-judgement interest.

Structured compensation

Courts should be provided with legal authority to order, if they deem it to be appropriate, that upon the application of either party to an action, judgements be paid on a periodic basis.

Offer of settlement

To provide an incentive for parties to assess losses realistically and to reach agreements sooner, the B.C. Supreme Court Rules should be amended to allow the insurance corporation (or any other insurer acting on behalf of a defendant) to offer a victim (the plaintiff) the assessed value of a claim by way of "an offer of settlement." Plaintiffs would be allowed to accept this money and still pursue litigation for additional amounts they believe a claim is worth. Upon judgement, court-ordered interest would apply only on the excess. To ensure their propriety and adequacy, any such offers made by an adjuster of the corporation would have to have the written approval of a lawyer in the corporation's legal department or that of an outside lawyer hired for this purpose.

Time limitation for accident benefits

To protect individuals suffering a recurrence or late manifestation of injury, the limitation on the commencement of an action for no-fault accident benefits (as stated in Section 7.37, Part VII of the Insurance (Motor Vehicle) Act) should be modified so that from the incurrence of an expense victims have one year to claim indemnity.

EFFICIENCY

Contingency fees

Contingency fees are inappropriate in cases where liability is not seriously in dispute. When these fees are appropriate, the percentage charged should be graduated according to the size of the award, with smaller percentages being charged for larger amounts. Party and party costs awarded by a court should, as a general rule, be credited to the client.

It is the responsibility and duty of lawyers, at the time of presenting a bill, to advise clients of their right to have the bill taxed by the Registrar of the Supreme Court. Access to taxing should be easy both for lawyers and their clients.

Special damages and pre-judgement interest

Income loss should be defined as an item of special damages.

INTELLIGIBILITY

Public information and education

The corporation should continue its present efforts to inform claimants about their rights and what they should expect in the course of making claims. Efforts should also be made to educate the general public about the present fault system and about no-fault alternatives.

THE PROPOSED PLAN AND ITS COSTS

To determine the cost implications of the committee's recommendations, it was necessary to design a specific plan. Though we do not feel it must be adopted in every detail, this plan provides the essential components we believe are required to meet the criteria we have established for a just and secure compensation system.

As a result of our cost study, we conclude that for economic losses it is feasible to design a compensation system based on the no-fault principle that would return more money to victims, without it costing more than that currently paid by the motorists of the province. Details are included in section 5.4 of the report.

Report by the

Automobile Accident Compensation Committee

British Columbia 1983

Introduction

Automobile accidents have tragic human costs

In British Columbia, as in much of the world, compensating people who have suffered bodily injuries in automobile accidents is a responsibility of staggering proportions. Of all deaths in B.C. due to unnatural causes (including all accidents and acts of violence), the largest single cause by far is motor vehicle accidents (see table 0.1).

In its first nine years of operations, from 1974 to 1982, the Insurance Corporation of British Columbia incurred a total of 365,000 injury claims resulting from automobile accidents. The cost of these claims is approximately $1.5 billion. During the same period, the provincial Ministry of Transportation and Highways recorded a total of 6,558 motor vehicle accident fatalities. And these are more than just numbers: they represent people injured, maimed, and killed. People you and we all know—our family, friends, relatives, neighbours, colleagues, and sometimes ourselves—the victims of automobile accidents.

Automobile accidents are, unfortunately, part of our way of life. While every reasonable measure must be taken to reduce their number and severity, there will always be accidents. To the degree that our society is compassionate, we must acknowledge the consequences of our automobile culture and accept the responsibility of dealing justly with the victims of that culture.

The committee's mandate

Within a few years after ICBC was established, the Board of Directors began to realize that the compensation system for bodily injuries—which is a combination of insurance and

liability (tort) law—may, by its very nature, produce injustices in the way it operates. In 1979, the corporation decided to examine the present system and recommend ways to improve it.

TABLE 0.1

Mortality from Accidents and Violence by External Causes

British Columbia, 1981

Cause of Death	Number of Deaths	%
Motor vehicle accidents	839	36.4
Other transportation	124	5.4
Accidental poisoning	148	6.4
Accidental fall	294	12.7
Accident caused by fire	74	3.2
Accidental drowning and submersion	112	4.9
Other accidents	124	5.4
Suicide	398	17.2
Homicide	107	4.6
Injury (undetermined whether accidentally or purposely inflicted)	87	3.8
Injury resulting from operations of war	1	—
Total	2308	100.0

Source: *Division of Vital Statistics, Ministry of Health, B.C.*

An independent committee—the Automobile Accident Compensation Committee—was appointed to study the present compensation system and report its findings and recommendations to ICBC's President and Board of Directors. The terms of reference the corporation presented to the committee were as follows:

- To review and discuss the present tort liability system as it compensates motor vehicle accident victims in British Columbia.
- To identify areas for improvement that would reduce or redress inadequacies and/or inequities in this aspect of the tort liability system.

- To review and discuss no-fault insurance as it operates in British Columbia in conjunction with the tort liability system.
- To identify areas for improvement in the no-fault insurance system in British Columbia that would parallel changes in the tort liability system.
- To recommend to the Government of British Columbia, via the Board of Directors of ICBC, improved methods of compensating accident victims at no substantially greater cost to the motoring public.

The committee's organization and work

The corporation asked several organizations with special interest in automobile accident compensation to nominate delegates to represent those interests on the committee. The eleven members who formed the committee in January of 1979 represented five interest groups: independent insurance agents, independent adjusters, lawyers, consumers, and ICBC. For the sake of continuity, all the original members remained on the committee regardless of whether they retained their positions in the organizations which they first represented. Throughout the duration of our studies, most of the committee's members reported to their own organizations on an informal basis, solicited their opinions, and reflected these back to all of us.

Since the committee is not a formal, government-appointed commission, we did not hold public hearings or invite public submissions. Nor did we have a large budget or staff. Nevertheless, we have tried to examine the issues as fully as possible, allowing the diversity of views within the committee to be considered thoroughly. We have met an average of about once a month. We have also read and discussed a great deal of background information, held several special meetings with leading individuals in the compensation field, and sponsored three public opinion surveys. Our objective was to try to understand how the compensation system actually works—not only as reflected in statistics, but as it is experienced by accident victims.

This report

This report reflects our concern with how the present compensation system affects people. We have not held back from saying things that might be unpopular or controversial, because we believe this important subject demands honest and straightforward analysis and criticism.

Our opinions, of course, have not always been unanimous. Even though a consensus has evolved during our four years of work, there are still many differences, as could only be expected with so crucial a subject. The report, therefore, while primarily presenting the majority's views, also includes minority opinions wherever appropriate.

Many of the recommendations we advocate to change the system would require legislative action, and there would undoubtedly be public and political debate before this could happen. We hope our report can serve as a background document for public discussion, as well as a guideline for future change.

The report is divided into five principal parts: The first three parts review the present system for compensating automobile accident victims in British Columbia. Part 1 describes the system in theory and in practice. Part 2 presents the criteria we believe should be used to evaluate any compensation system. In Part 3 we use these criteria ourselves to judge the present system. Part 4 is a brief review of alternative systems now operating in other jurisdictions. Finally, in Part 5 we present our recommendations for major long-term improvements in the way compensation is provided and for interim measures that could be instituted in the meantime to partially resolve a few problems as soon as possible. Also included in Part 5 is an evaluation of the cost implications of our recommendations.

PART ONE

The Present System

The Present System

This part of the report provides a general overview of the present system for compensating automobile accident victims in British Columbia. We begin with an examination of the system's essential elements.

Compensation is based on tort law and insurance

Compensation is something provided to counterbalance the effects of something else. It is a way of making amends. For people who suffer injury in automobile accidents, amends are made through a combination of two systems: tort law and insurance. The operation of these two entities individually and in relation to one another makes up the present system of accident compensation.

Tort (derived from the Latin word for wrong) is a concept of liability. As a major part of common law, its purpose is to enable someone who has been wronged by another person to seek redress from that person for the losses suffered. There are two types of tort: intentional torts, such as assault and battery, and unintentional torts. With unintentional torts, a victim must prove that the alleged wrongdoer acted with negligence. In automobile accident cases, for example, victims must establish that their injury resulted from the alleged wrongdoer's negligent operation of a motor vehicle. Through the application of this concept by the courts, victims may recover damages or compensation from those responsible for their injury.

Insurance, on the other hand, is a financial system in which one party agrees by contract to indemnify or guarantee another party against losses suffered from specific situations or perils. In effect, insurance allows individuals

exposed to a common risk to pool their resources so that any one of them who suffers a loss from that risk is compensated out of the common fund. Insurance protects groups of people from individually having to bear potentially large losses. Liability insurance for motorists, for example, protects them in case they are held responsible for the losses incurred in an automobile accident.

In British Columbia, however, there are two basic forms of automobile accident insurance. One form provides all victims with limited amounts of compensation no matter who was at fault in an accident. The other form, known as third-party liability insurance, is the principal source of compensation and is provided strictly according to its interaction with tort. It does not directly cover the losses suffered by the person who holds the policy. Instead, an insurer agrees to indemnify policyholders against any losses they may incur as a result of being held liable for causing someone else's injury. In short, the present system for compensating accident victims depends largely on insurance that covers responsibility for injury, rather than covering injury itself.

The following two sections of Part 1 review the fundamental concepts and provisions of the present compensation system's two basic components—tort and insurance. A third section describes the process accident victims in British Columbia go through to receive compensation.

1.1 The Fault System

In British Columbia, as in most of North America, determining liability for causing an automobile accident injury requires proof of negligence. Drivers are liable if it is proved their negligence caused an accident.

The onus of proof, however, is on the injured party, not the alleged wrongdoer. Furthermore, it is not enough, generally speaking, to prove that the other person merely caused the accident. Instead, the plaintiff must establish that the defendant caused the accident through negligent wrongdoing; that is, that the defendant was at fault—hence the name "fault system."

Although now in widespread use, the negligence principle, as we know it, did not emerge until early in the last century. Before that, throughout most of recorded history, the law operated according to a principle of "strict liability" by which persons who caused an accident were held responsible whether negligent or not. Under strict liability, victims must only prove that the wrongdoer caused the damage. To avoid liability, wrongdoers must prove they did not cause the damage.

1.1.1 EVOLUTION OF LIABILITY LAWS

An eye for an eye

The earliest form of justice is expressed in the Biblical saying "an eye for an eye, a tooth for a tooth." In its day, this credo represented a universal code according to which compensation for wrongdoing was achieved through direct, personal retaliation. If someone was harmed, justice consisted of the victim or the victim's relatives doing like harm in return.

The tradition of personal retaliation, which had already been practised for centuries, was first formalized in the 18th century B.C. Code of Hammurabi. Whether legally sanctioned or not, however, personal retaliation was much more a form of revenge or punishment than an allocation of liability. Later societies sought, in one way or another, to substitute more orderly and socially acceptable forms of justice for the anti-social practice of persons taking the law into their own hands.

Antecedents of present law

The roots of present Western law go back to the ancient Romans, whose highly refined body of civil law was later abandoned when the empire declined and collapsed. The city-states and monarchies of the Dark Ages reverted to archaic and parochial liability laws that prescribed fixed penalties for specific types of damage to property or persons —such as 12 shillings for a severed ear.

These various codes of fixed penalties underwent major changes in the late Middle Ages and early Renaissance. Probably because of the growing importance money played in the economy, it was felt that compensation should more clearly reflect actual monetary losses. Determining the monetary value of specific losses, however, required a more sophisticated jurisprudence—and out of this need, the tort system evolved.

Early tort decisions were not concerned with determining fault. Even though courts attempted to assign responsibility for damages, it was not necessary for victims to prove exactly how damage had been done or that an alleged wrongdoer had acted with negligence. The ruling principle was quite simply that persons who caused damage or injury were strictly liable for their actions and, thus, had to compensate victims fully for their losses.

The principle of negligence

In the 19th century, tort law—responding to new problems and attitudes created, in large part, by the Industrial Revolution—veered away from the principle of strict liability. New legal interpretations reflected the philosophy that technological innovation and industrial expansion should not be impeded by the threat of incessant damage suits inherent in the principle of strict liability.

The concept of negligence arose as a compromise between a basic moral belief in individual responsibility and the need to adapt to the realities of a rapidly expanding industrial economy. The role of negligence in tort law allowed courts greater flexibility in determining when the cost of damages incurred in an accident should be borne by the victim or be shifted to the instigator of the accident.

The negligence principle sufficiently reduced the risk of liability so that entrepreneurs could successfully develop and market new technologies, including transportation systems, without fear of excessive litigation. Mere proof that a defendant had caused damage was no longer sufficient to establish liability. Henceforth, it was necessary for accident victims to prove that their injury resulted directly from the

negligence of the other party. To prove negligence, victims had to provide evidence that the alleged wrongdoer had not taken the care that a reasonable person would have taken in similar circumstances.

The negligence principle decisively shifted more of the burden of proof onto the victim. As courts became more stringent in enforcing this requirement, the rules surrounding proof of negligence became more complex and more difficult to satisfy, although in recent years both courts and legislatures have eased some of these rules.

Indeed, throughout history, the laws governing liability have changed to reflect the social mores of the time. A form of justice that was socially acceptable in one age may not have been in the next.

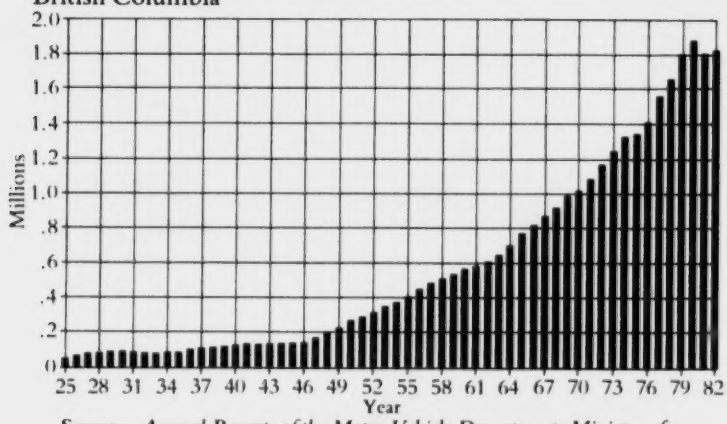
Tort and the automobile

Following the Industrial Revolution, a new machine of personal transportation, the automobile, soon put the negligence principle to the test. As the number of vehicles grew, the risks of automobile ownership quickly became apparent in a rapidly increasing number of accidents and tort cases (see charts 1.1 to 1.3).

In a few countries—particularly those governed or influenced by the Napoleonic Code—the motor vehicle was deemed an inherently dangerous object. In the event of an accident, drivers were presumed responsible and the onus fell on them to prove their innocence.

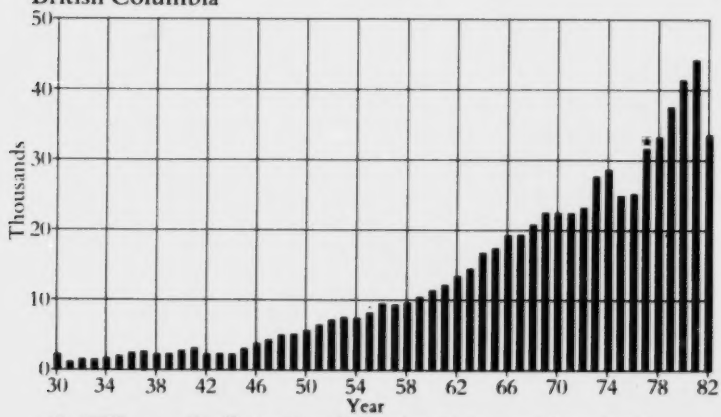
Meanwhile, in England, the United States, Canada, and other nations where the influence of common law prevailed, the automobile was not given the status of clear and present danger—as was given, for example, to dynamite, dangerous chemicals, and guns. Instead, the ordinary principle of negligence—the fault system—was adopted. Therefore, as for most other accidents, the onus fell on the injured party in an automobile accident to prove that the other person was at fault.

CHART 1.1
Motor Vehicle Registrations
British Columbia



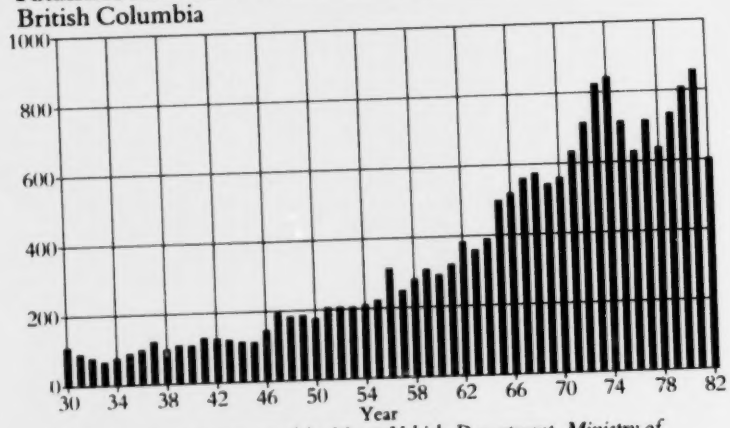
Source: *Annual Reports of the Motor Vehicle Department, Ministry of Transportation and Highways (and its antecedents).*

CHART 1.2
Injuries Related to Automobile Accidents
British Columbia



*In 1977 a new Traffic Incident Reporting System was introduced.
Source: *Annual Reports of the Motor Vehicle Department, Ministry of Transportation and Highways (and its antecedents).*

CHART 1.3
Fatalities Related to Automobile Accidents
British Columbia



Source: *Annual Reports of the Motor Vehicle Department, Ministry of Transportation and Highways (and its antecedents).*

Recent legal developments in British Columbia

Reflecting national trends, the Government of British Columbia has modified various laws over the years to make it easier for victims to recover compensation under tort liability.

Under the earlier rule of contributory negligence, for example, plaintiffs were not entitled to recover anything at all if their own negligence had contributed, even in the slightest degree, to the cause of an accident. This rule was so severe that many victims were barred from recovering any damages at all. Gradually, as concern for the plight of victims grew, a concept of comparative negligence was substituted. Under this later rule (which was passed by the B.C. legislature in 1925), plaintiffs could recover damages to the degree to which they were not themselves negligent.

In a related matter, persons injured in a motor vehicle accident where the driver of the vehicle they were a passenger in was found at fault were considered to have assumed the risk of their own safety. They were, therefore, not entitled to sue their driver for damages. In 1942 the legislature changed the law so that passengers could sue if their driver

was guilty of gross negligence. This was later eased even further to permit all passengers (except the driver's spouse) to recover damages from their wrongful driver whether the negligence had been gross or not.

In yet another reform, the province's Motor Vehicle Act was amended in 1937 to make owners responsible for accidents involving their automobile whether it was they or someone else driving it at the time of the accident. This rule is called "vicarious responsibility." After 1948, when all owners were henceforth required to show proof of financial responsibility (usually accomplished by carrying insurance), vicarious responsibility ensured that, even in cases when an uninsured driver who was driving someone else's car was found at fault, innocent victims would have legal recourse.

1.1.2 PURPOSE OF THE FAULT SYSTEM

Three commonly held views about the tort system are that it acts as a deterrent to bad driving, as retribution against wrongdoers, and as a source of compensation for victims.

Tort as a deterrent to dangerous driving

The potential severity of accidents and the size of court awards might make it appear on the surface that the threat of tort action is a deterrent to dangerous driving. To the degree that this deterrence is effective, it serves as a measure of society's condemnation of harmful conduct and as a less expensive form of persuasion than police enforcement and criminal law sanctions.

Nevertheless, it appears that the somewhat remote and not very widely understood threat of liability is considerably less a deterrent than the more certain results of accidents: injuries, inconvenience of property damage, and increased insurance premiums. It is in its connection to insurance premiums where tort seems to be effective as a deterrent. The public's understanding that premiums respond to an individual's record of claims appears to have some real value, not just as a deterrent to unsafe driving, but as an incentive to safe driving.

Tort as a way of retribution against wrongdoers

Another psychological function of the fault system is its apparent provision of personal retribution. The tort process preserves a vestige of the ancient "eye for an eye" morality of retaliation insofar as it allows victims to get back at their wrongdoers by taking them to court. The emotional energy released in exercising this right promises to satisfy a deeply rooted desire for retaliation.

Whether victims successfully achieve retribution, however, is really dependent on two other factors: how well victims are able to prove an alleged wrongdoer's liability, and how much liability insurance the wrongdoer carries. When their insurance coverage is inadequate, wrongdoers might have to pay the damages themselves, drawing on their own personal assets; or more likely, they might have to declare bankruptcy. But in the vast majority of cases, the entire burden of actually paying compensation is shifted to the insurance company—which in B.C. is a publicly owned Crown corporation, the Insurance Corporation of British Columbia (ICBC). In other words, wrongdoers usually do not pay for the accidents they cause; all policyholders as a group share these costs.

Tort as a source of compensation for victims

While tort law does not appear to function very effectively as a deterrent or for retribution, it is designed to provide innocent victims with the ability to obtain indemnity from wrongdoers: indemnity individually tailored to each victim's particular circumstances. The intent of tort is to restore an injured party, after damages are paid, to the same position he or she held before being injured. In this respect, the purpose of tort law is described as "making the victim whole again."

How do victims establish their right to being made whole again?

Determining liability under tort

Under the negligence principle, the attention is focused on an alleged wrongdoer's conduct, with the underlying

assumption that drivers cause accidents through carelessness that could be avoided if they were more cautious. The standard by which the carelessness of alleged wrongdoers is judged is called the doctrine of "the reasonable man." The reasonable man standard is an abstract ideal of how a person who always uses common sense and drives reasonably would act in particular circumstances.

While reasonableness in any specific case is open to interpretation during the proceedings of that case, various standards have evolved to describe what are now considered reasonable actions under most driving conditions. Some of these standards are incorporated into official regulations, and others have less formal status. Most make common sense. For example, it is generally agreed that drivers should maintain a constant lookout, give warning of their intended actions, and anticipate the actions of others.

In the majority of accidents that cause minor injuries, fault is admitted by one of the parties, and thus the question of liability seems relatively clear. Most of these cases never go to court.

In the cases that are legally contested, particularly major injury claims, liability can become quite clouded by the close scrutiny each driver's actions receive, usually some time after the event actually occurred. Under the negligence principle, three elements must be present to establish an alleged wrongdoer's responsibility: the standard of careful driving that should have been followed in the circumstances surrounding the particular case; proof that the wrongdoer failed to meet that standard; and proof that this failure or negligence was the proximate cause of injury—that is, the cause which most immediately led to the accident and the resulting injury.

Receiving compensation under tort

Because of its general use, liability insurance—also known as third-party insurance—is widely perceived as providing protection for potential victims. Insured persons are known as the first party, their insurance company as the second party, and injured victims as the third party. Although first-

party or no-fault insurance does exist in British Columbia (as discussed below), third-party liability insurance provides the bulk of compensation paid to injured victims. It is, however, a complete misunderstanding of liability insurance to perceive it as a protection plan for victims. In fact, it is a plan for relieving the wrongdoer's burden of liability, not the victim's burden of loss. To obtain compensation from another person's liability insurance, a victim must prove the other person's negligence under the fault system. Thus, the primary avenue for receiving accident compensation is neither liability insurance nor tort alone, but a combination of both.

There are additional sources of reparation which supplement liability insurance benefits or take over entirely when no third-party insurance benefits are available—that is, when a victim is also the wrongdoer, when a wrongdoer has inadequate or no liability coverage, or when the wrongdoer is unknown. These other sources of compensation include public health insurance, disability insurance, assistance of family and friends, public welfare, and charitable organizations; as well as supplements to liability coverage, namely Underinsured Motorist Protection and the uninsured motorist provisions of the Insurance (Motor Vehicle) Act. In addition, while not sources of outside compensation, personal savings and assets are often a victim's first means of support.

So, while the fault system provides an avenue for victims to seek redress, and liability insurance provides a source of compensation funds, whether victims are, in fact, adequately compensated depends on their success in winning their case and on the adequacy of available compensation. For most victims there are few if any problems because liability is not in question and the amount of loss is small. It is with the more serious cases that problems may arise.

1.1.3 CALCULATION OF REPARATION

As discussed above, the legal intent of liability reparation is to "make the victim whole again" by compensating for the losses suffered. Although restoration is the objective, it is

clearly impossible to provide any victim with perfect compensation. Someone who has lost a leg, for example, obviously can never regain it. So how do the courts measure losses and translate these losses into quantitative, monetary compensation?

This question has been an ongoing dilemma ever since the tort system first provided monetary compensation. Some losses are relatively easy to measure arithmetically; but others have social, moral, and economic complications, such as what standard of medical care and rehabilitation a particular victim should have, what is the person's likely lifespan, how will future inflation affect the award, and so forth.

The Trilogy decisions

In 1978, the Supreme Court of Canada, in ruling on three serious injury cases commonly known collectively as the Trilogy, established two basic principles of compensation:

1. The plaintiff (the innocent victim) is entitled to full compensation for past and present economic losses; with loss of prospective earnings subject to an allowance for the contingencies of life expectancy and inflation.
2. Compensation for non-economic losses—such as pain and suffering, shortened life expectancy, and loss of amenities—should be fair and reasonable.

The Supreme Court's method of calculating involves four types of damage (called "heads" of damage). The first three are for economic losses: special damages, loss of future income, and cost of future care. The fourth type of damage covers non-economic losses. (The definition of these categories varies slightly in British Columbia. Refer to the Glossary for clarification.)

In Canada the courts have adopted an actuarial method of assessing future economic losses, with the reasoning that the statistical evidence produced by actuaries is the best basis available for quantifying damages according to probabilities and uncertainties. This method involves calculating the exact amount a single lump sum payment should be so that, when invested, it will produce a certain income over a specified period of time, exhausting itself at the end of that period.

Special damages

The Supreme Court of Canada defined special damages as pre-trial loss of income or profit and pre-trial expenses. The latter also includes pre-trial costs of hospitalization and medical care, much of which in British Columbia is usually covered by the provincial hospital and medical insurance plan and then later recovered from ICBC.

These damages may also include household and living expenses which victims incur to re-establish a lifestyle equivalent to the one they had before the accident.

Loss of income

In British Columbia, the loss of past income from the date of an accident to the date of a trial is not treated as special damages but is included with the general damages awarded for economic losses. The rationale for this is that past loss is considered part of the overall damage to the capacity to earn income. Calculating pre-trial earnings is usually a fairly straightforward matter.

The calculation of a victim's loss of future income is somewhat more complicated and is based on five factors:

1. The level of earnings that would have been received had the victim not been injured, reduced by the amount the victim will now be able to earn, if any.
2. The length of time during which the victim's income will be reduced, which for serious cases could amount to the person's entire working life expectancy.
3. Probable lifespan and other contingencies.
4. Projected inflation, interest, and discount rates.
5. Any overlap between the award for future income and awards for other types of damages, and any reduction thus warranted because of the victim's reduced need for substitute income.

Cost of future care

Future care and rehabilitation costs are a particular concern in serious injury cases. In the Trilogy, the Supreme Court established that such victims should be assured of receiving a

very high standard of medical care and rehabilitation for the rest of their lives, provided that the cost is reasonable. The standard the court defined tends to be higher than is provided under most compensation and rehabilitation schemes currently operating in Canadian jurisdictions.

Calculation of the cost of future care is based on five factors, similar to those listed above:

1. The costs necessary to achieve the victim's optimal health and to establish a lifestyle reasonably close to what the victim would have enjoyed had it not been for the injury.
2. The length of time that care will likely be required, with costs divided between capital and ongoing expenses.
3. Probable lifespan.
4. Projected inflation, interest, and discount rates.
5. Any potential overlap between this and other types of compensation.

Non-economic losses

This area traditionally covers compensation for pain and suffering, loss of amenities and enjoyment of life, and reduction of life expectancy. These obviously subjective values are not easily quantified. Prior to the Trilogy, awards tended to be based on earlier precedents; whereas the Supreme Court attempted to establish actual premises upon which compensation in this area should be determined.

To quote Mr. Justice Dickson:

> The problem here is qualitatively different from that of pecuniary losses. There is no medium of exchange for happiness. There is no market for expectation of life. The monetary evaluation of non-pecuniary losses is a philosophical and policy exercise more than a legal or logical one. The award must be fair and reasonable, fairness being gauged by earlier decisions; but the award must also of necessity be arbitrary or conventional. No money can provide true restitution. [Andrews v. Grand and Toy Alberta Ltd. ((1978), 83 D.L.R. (3d) 452 (S.C.C.) at pages 475-6)]

The Supreme Court decided to use what it called a "functional approach" as the standard for determining non-economic losses. The meaning of functional in this regard is that

compensation should be adequate to provide an injured victim with "reasonable solace for his misfortune." In other words, an award should allow victims to achieve a measure of consolation in the form of arrangements that make their altered life more endurable.

The Supreme Court recognized, however, that the arbitrary nature of non-economic damage awards can have serious implications for society at large. If left uncontrolled, the trend towards escalating personal injury awards (as typified by the very large, well-publicized awards in the United States) could deplete the fund of money available to compensate all victims.

In response, the Supreme Court established in the Trilogy decisions that, while there should be no maximum limit to the amount of compensation for calculable economic losses, there should be a reasonable ceiling on the amount of compensation for non-economic losses in order to limit the social impact of extremely high awards. The Trilogy set $100,000 in 1978 dollars as that limit, with the understanding that this should be adjusted annually to reflect increases in the cost of living.

Party and party costs

In addition to compensation for the losses described above, it is customary in B.C. that courts also award successful plaintiffs what are called "party and party costs." These are based on a now outdated tariff of legal fees and only cover, if anything, a very small portion of a victim's actual legal costs.

Pre-judgement interest

Pre-judgement interest, a relatively new phenomenon, was instituted in British Columbia in 1974 and has since become a regular item awarded in serious injury cases. It consists of interest applied to all non-economic losses and to economic losses incurred from the date of an accident to the date of the court's decision. It is intended to compensate a victim for the interest income that could have been earned if the award had been received on the date the loss occurred.

Most sums an insurer provides a victim in advance of a trial are not included in the computation of pre-judgement interest, from the date they were received. The interest rate determined by the court is usually in reference to the prime lending rate, not the savings rate. Since it is considered part of the settlement, pre-judgement interest is tax free, and a portion of it may be included in the lawyer's contingency fee, if there is one.

Fatal accident cases

In British Columbia, survivors' liability claims resulting from automobile accident deaths are subject to the Family Compensation Act. With few exceptions, the right to sue for damages for wrongful death is restricted to relatives, including the husband, wife, children, parents, grandparents, grandchildren, and person or persons for whom the deceased stood legally in place of a parent.

In most fatal accident cases, damages are allowed for economic losses and include the following: loss of dependency on income for dependants of a wage earner; loss of dependency on valuable services awarded for the activities of the deceased that were not income-producing but were nevertheless valuable to the plaintiff(s); loss of guidance awarded to the children of the deceased; and loss of accumulated wealth awarded to dependants for the loss of capital assets they would have received as inheritance at some future date had the victim not died.

1.2 Automobile Insurance

Automobile insurance has changed more rapidly in British Columbia and throughout the world than any other form of insurance and has grown to become the largest single component of the property and casualty insurance industry.

Evolution of automobile insurance

The increasingly pervasive use of automobiles has provided nearly ideal conditions for the institution of insurance. There is a high, apparent risk in using an automobile since accidents are commonplace and often expensive. Because there are a large number of owners, the risk is widespread and the cost of likely accidents can be predicted with reasonable accuracy. Through their payment of insurance premiums, owners pool their resources so that when any one of them has an accident, the burden of that individual loss is sustained by the whole group.

The earliest form of automobile insurance, which was offered shortly after motor vehicles first appeared, covered damage to the vehicle itself, since it was recognized as a particularly expensive item of personal property. Although automobile damage remained the most frequent type of claim, it soon became apparent that liability for causing injury presented an even greater financial risk for owners and drivers.

Since then, third-party liability insurance has become the most important feature of coverage. Not only does it protect drivers from third-party claims, but, as has been increasingly recognized, it is also the principal source of compensation for victims. With this recognition, attention has focused less on the wrongdoer's burden of liability and more on the plight of the victim. As a result, governments during the past 30 to 40 years have progressively altered the laws regulating insurance to try to improve the position of the victim in regard to liability compensation.

In British Columbia and much of North America, these changes have followed a remarkably similar pattern. The key

problem governments have attempted to resolve is how to ensure that a source of compensation money is always available. Under tort law, wrongdoers are held legally responsible for paying damages. But if they have no funds or insurance, there is no money to compensate their victims. The first attempt to solve this dilemma required motorists to maintain proof of adequate financial responsibility either through personal means or through insurance.

Many drivers, however, were denied insurance because their driving records made them appear too great a risk. This was apparently resolved by requiring insurance companies to share these high risk policies. Since this did not always work —and there were also drivers who simply would not pay for or could not afford insurance—funds were set up to indemnify the victims of uninsured drivers. Eventually, since none of these measures proved totally adequate, some governments decided that liability insurance should be made compulsory.

Some jurisdictions, including British Columbia, also concluded that since liability insurance had been made compulsory for all motorists it should also be made as available, affordable, and equitable as possible. To accomplish these objectives, the government in this province established a public monopoly on automobile liability insurance.

The most recent development in the evolution of automobile insurance has been a growing belief that all of the various remedies devised for improving the victim's position through third-party liability coverage still leave unresolved the basic problem that in serious injuries adequate compensation is usually possible only when fault is proven and there is sufficient insurance coverage. For those victims at fault, third-party coverage does not compensate their injuries. For innocent victims, difficult obstacles must be successfully overcome in dealing with large insurance companies from an adversarial position. To mitigate the hardships created by this situation, many jurisdictions have introduced various degrees of so-called no-fault insurance.

1.2.1 DEVELOPMENT OF B.C. COVERAGE

Financial responsibility for liability

Prior to World War II, automobile insurance in British Columbia was governed almost exclusively by the Insurance Act, with very few special provisions for motor vehicles. Following the war, the increasing number of automobiles and the expanded program of highway construction resulted in a growing number of accidents, injuries, and deaths. In 1948 the provincial government, recognizing a need for better automobile regulation and insurance protection, passed the Motor Vehicle Act.

The act addressed what was then perceived as the major problem affecting victims of accidents: how to make sure that drivers held liable for damages could actually pay them. Similar to automobile legislation common throughout the rest of North America at the time, the act required vehicle owners to demonstrate a prescribed level of financial responsibility when and if they were involved in an accident.

Although not explicitly required, insurance coverage became, in effect, the customary proof of financial responsibility. This implicit endorsement of universal insurance was further emphasized in that the act specified the minimum amount of third-party legal liability coverage that an insured motorist had to carry to satisfy the financial responsibility requirement. When the act was first proclaimed, the minimum limit was $5000 for one injured person, $10,000 for two or more injured people, and $1000 for property damage. These limits were increased over the years, reaching $100,000 as the minimum required since 1980 to cover, inclusively, all third-party risks.

By not making automobile insurance mandatory, the Motor Vehicle Act preserved the free choice of individuals to select their own way of establishing financial responsibility for damages they might cause. Free choice, however, did not motivate all drivers to become sufficiently responsible. Nor did it solve the related problem of how to compensate the victims of uninsured motorists.

During the 1950s, the effectiveness of financial responsibility laws was challenged all over Canada and the United States. In British Columbia in 1960, the government introduced an "impoundment law" by which vehicles of uninsured motorists involved in accidents were impounded by the police. But impounded vehicles provided no remedy for accident victims. Furthermore, the practice had little apparent effect in encouraging more universal purchase of liability insurance.

Protection from uninsured motorists

In 1961, acting under the Motor Vehicle Act, the government established the Traffic Victims Indemnity Fund. This was a new approach, then gaining widespread application across North America, to the problem of how to compensate the victims of uninsured motorists and hit-and-run drivers.

A related problem that had emerged was the unavailability of insurance for drivers with bad records. The government attempted to correct this by establishing the Assigned Risk Plan, a program proposed by the private insurance industry. The plan enabled motorists who were refused insurance to apply to a central authority. Using a quota system, the central authority assigned these high risk policies to the various automobile insurers operating in the province so that each company took an equitable share according to its proportion of the total market.

In spite of the Assigned Risk Plan, problems persisted. Premiums used by the plan proved inadequate to cover the losses incurred. Market conditions led to over-use of the plan, with some good drivers also being diverted to it. By the mid 1960s, it was estimated that ten percent of B.C. vehicles were still uninsured. Accidents involving uninsured motorists remained, and complaints about slow payment or slow settlement of claims were commonplace.

Compulsory liability insurance

In 1966 the provincial government appointed a Royal Commission on automobile insurance and accident compensation, headed by The Hon. Mr. Justice R.A.B. Wooton of

the B.C. Supreme Court. The Wooton Commission attempted to clarify the many issues and to recommend a plan that would bring more equity into the system.

The Wooton Commission recommended many far-reaching changes in the way accident compensation was provided, even including the complete replacement of the fault system with a no-fault method of insurance. The government did not adopt this particular recommendation, but it did respond to the commission's findings by enacting, in 1969, a number of significant amendments to the Motor Vehicle and Insurance Acts. In particular, these changes accomplished the following:

1. Required mandatory liability insurance for all automobile owners.
2. Introduced limited, compulsory coverage for no-fault accident benefits to be furnished by private insurers for each policy.
3. Provided a procedure through which government auto insurance could later be introduced.
4. Established the Insurance Board of British Columbia to exert a degree of direct government control over the affairs of the private insurance industry.

Introduced on January 1, 1970, the no-fault coverage provided death benefits, partial salary replacement of up to $50 a week (if totally disabled) until age 65, and a limited no-fault coverage for the medical and rehabilitation expenses of anyone injured as a result of the use or operation of motor vehicle.

Even with these important changes, dissatisfaction with the compensation system continued. The expectation that speedy payment of the new no-fault accident benefits would satisfy the motoring public was not fulfilled. Much of the goodwill generated by the accident benefit scheme was offset by the continuing difficulties hard-to-insure persons faced in obtaining coverage at a reasonable cost. There was also considerable dissatisfaction with repair delays, cost of coverage, and liability disputes involved in property damage claims—in addition to the problems with injury compensation that we are concerned with in this report.

Introduction of Autoplan

The 1972 provincial election brought in a new government, one of whose campaign promises had been the establishment of a publicly owned automobile insurance plan, as already provided for under the amended Motor Vehicle Act. They argued that rates could be maintained at an affordable level by eliminating the profits that the private insurance industry was taking. The new government passed two acts concurrently: the Insurance Corporation of British Columbia Act and the Automobile Insurance Act—which are now called, respectively, the Insurance Corporation Act and the Insurance (Motor Vehicle) Act.

The first act created a Crown corporation for the purpose of operating a universal compulsory automobile insurance scheme, known as "Autoplan." The Automobile Insurance Act set up the new insurance system. Section 8 of this act prohibited private insurers from writing any automobile insurance business in British Columbia; but this section was never proclaimed and was repealed in 1977 by the new government elected in 1975.

In 1973 a group of private insurers challenged the validity of the Automobile Insurance Act before the courts. When the Supreme Court of Canada rendered the final decision in 1976, the challenge proved unsuccessful, and Autoplan became firmly established as the province's sole provider of compulsory third-party automobile liability insurance, as well as first-party accident benefits.

1.2.2 AUTOPLAN COVERAGE (1983)

The accident compensation provided by Autoplan is now spelled out in the Insurance (Motor Vehicle) Act and its detailed regulations. The regulations replace both the insurance contract previously used by private insurers and the governing legislation commonly used in other provinces and states. Those aspects of the regulations specifically pertaining, as of 1983, to compensation for injuries or death are briefly summarized below.

Basic liability coverage

The basic compulsory insurance provided by Part VI of the Regulations of the Insurance (Motor Vehicle) Act provides $100,000 in third-party legal liability for the owner of an insured vehicle, any other licensed operator who drives with the owner's permission, and passengers in certain cases. This coverage protects an insured who is legally liable for an accident against claims by others for bodily injury, death, or property damage to a total limit of $100,000 for each occurrence of an accident. In addition, pre-judgement interest (subject to the policy limit) and all legal and claims investigation costs arising from the defense of the claim are covered.

An insured driver who does not have a higher optional policy limit and is found legally liable is responsible for payment of any claims in excess of the $100,000 basic limit.

Under both the Married Woman's Property Act and the Regulations of the Insurance (Motor Vehicle) Act, the spouse of an insured may not recover damages from that person's liability insurance. Other members of the family can.

Payment of claims for bodily injury or death has priority over payment of claims for property damage. With a $100,000 limit, claims for bodily injury or death have priority on the first $90,000. Property damage claims have priority on the $10,000 balance. This same ratio applies to any higher amounts of optional liability coverage.

Autoplan liability coverage provides protection in all 50 of the United States, as well as throughout Canada. The coverage does not extend to Mexico.

First-party accident benefits

In addition to third-party liability coverage, Autoplan also includes some first-party benefits. The forerunner of this coverage, now included under Part VII of the Regulations of the Insurance (Motor Vehicle) Act, was Section B of the Standard Automobile Policy introduced in British Columbia in 1970.

Regardless of who is at fault in an accident, the present plan provides benefits to the person named in an insurance policy and to the members of that person's household who are injured in an accident, to the injured occupants of a vehicle insured or operated by a person named in a certificate, and to pedestrians or cyclists hit in Canada by an insured vehicle.

It is not necessary for claimants of first-party benefits to demonstrate negligence on anyone's part, although benefits provided to victims under this plan are subtracted from any subsequent awards granted them from third-party liability coverage. Thus, for an innocent victim, these no-fault benefits serve, in effect, as partial, interim relief pending the resolution of liability action.

First-party accident benefits have been increased since the plan was first introduced. They are currently as follows:

MEDICAL AND REHABILITATION EXPENSES

- Reasonable medical and rehabilitation expenses up to a limit of $100,000 for each injured person. (Under amendments that took effect on January 1, 1983, the types of expenses covered, though not an exclusive list, are now listed in the regulations to provide an equitable standard of care for all victims. Items covered include the cost of acquiring a vehicle properly equipped for a disabled driver, altering a residence, paying for the services of a homemaker, acquiring wheelchairs and other equipment, and obtaining vocational or other training appropriate to a victim's condition and intended to improve his or her earning capacity and level of self-sufficiency.)

INCOME REPLACEMENT

- Disability payments of $100 a week to an income earner who is unable to engage in any occupation for wages or profit corresponding to his or her skill and ability because of an accident or injuries sustained in an accident. Similar provisions apply to the principal person at home, legally called the "housewife," but possibly male or female.
- After a seven-day waiting period, these payments are made for the duration of the disability, up to 104 weeks from the date of the accident.

- After 104 weeks, if it is established that the injury has totally disabled the victim from engaging in any occupation for which he or she is reasonably suited by education, training, or experience, the benefits are payable for the duration of the total disability.
- Total disability payments are reduced by the compensation victims receive from other sources, including Canada Pension Plan, Old Age Pension, Unemployment Insurance, and Workers' Compensation. Disability payments can also be reduced when the benefits payable under any plan or insurance contract exceed the insured's previous earning capacity.

DEATH BENEFITS

- Regular payments are made to the surviving spouse or dependant of a person killed in a motor vehicle accident beginning 60 days after the death and lasting for a specified period of time.
- In the case of the death of the head of a household, payments are:
  —a $5000 lump sum to the spouse, or other dependent survivor, plus
  —$1000 to each dependent survivor other than the first, plus
  —$100 a week for up to 104 weeks to the spouse or other dependent survivor, plus
  —$25 a week for 104 weeks to each additional dependent survivor other than the first.
  —Weekly disability payments made prior to the death are deducted from the weekly death benefits.
- In the case of the death of the spouse of the head of a household, the benefits are the same as above, except that the head of a household or dependent survivor receives a lump sum of $2500 instead of $5000.
- If both the head of a household and spouse die, the dependent survivors share $7500 in addition to their individual and weekly payments.
- In the death of dependent children, the parents share:
  —$500 for each lost dependent child up to five years of age, plus
  —$1000 for each lost dependent child from five to nine years of age, plus

—$1500 for each lost dependent child from ten to 18 years of age, plus $1000 for each lost dependent child 19 years of age or older.

FUNERAL EXPENSES
- Up to a limit of $1000.

Uninsured and unidentified motorist protection

Under Sections 19 and 23 of the Insurance (Motor Vehicle) Act and Part VIII of its regulations, all B.C. residents are protected if they are injured by a hit-and-run driver or an uninsured motorist, but only up to certain basic limits. In an accident in B.C. where the person responsible for the damage cannot be identified or is uninsured, Autoplan provides a total of $100,000 liability coverage, as well as the benefits available under Part VII.

For hit-and-run accidents occurring in B.C., the coverage for uninsured and unidentified motorists also applies to non-residents of the province, provided that they live in a jurisdiction which offers substantially the same protection to B.C. residents injured in that jurisdiction. When B.C. residents suffer injury or death outside of Canada, the protection applies only if the area where the accident occurred does not offer any form of hit-and-run coverage.

Optional coverage

In addition to the basic Autoplan coverage described above, there are several options available for people to increase their insurance to protect themselves in case they cause an accident or suffer injury from one.

The basic compulsory third-party legal liability insurance can be extended to various levels above the minimum $100,000. The maximum available is $10 million.

Underinsured Motorist Protection, first offered in January of 1980, furnishes insureds with extended protection in the event of an accident in which the person legally liable is unable to fully compensate recoverable damages. This option provides that the corporation will pay insureds any amount of damages, up to their own limit of liability, that exceed the amount payable under the liability coverage of the underinsured liable motorist.

For example, in a situation where a driver at fault has only the minimum $100,000 third-party liability coverage and the victim has Underinsured Motorist Protection and a liability limit of, say, $500,000, the corporation would pay the victim any damages exceeding the wrongdoer's liability limit ($100,000), up to a maximum of $500,000, subject to certain deductions.

One option which few policyholders (only about 500 annually) have taken advantage of is the Income Replacement Endorsement, also available since January of 1980. This coverage provides limited additional lost income protection and additional death benefits. It is specifically available to motorists who are not in a company or private program providing adequate long-term disability benefits, and who consider that the standard Part VII benefits would be inadequate to cover their lost earnings in the event of injury resulting from an accident. At present, in addition to the benefits provided under Part VII, a policyholder may obtain protection for lost income of up to $400 a week, and up to $20,000 in benefits for the death of the head of a household.

Forfeiture of indemnity

Insurance contracts are contracts of "utmost good faith." This means that an insured has the duty to inform an insurer of all pertinent details so that the contract may be entered on an equal footing. In Autoplan there is no contract as such, but this principle still applies in regard to the application form which must be completed to obtain insurance.

Under the Insurance (Motor Vehicle) Act, every car owner in British Columbia, with several exceptions, must carry insurance, and the basic coverage must be purchased from ICBC. Section 18 of the act provides for the forfeiture of insurance benefits if there has been a false statement on the insurance application form.

Insurance coverage may also be forfeited if an insured violates any condition of Autoplan, commits any frauds regarding the act, or wilfully makes any false statements concerning a claim under the plan. However, in the event that, because of an accident an insured dies or suffers very

serious injury to the extent that he or she becomes permanently incapable of employment, the forfeiture may be relieved. Benefits may also be restored in cases where the corporation determines that forfeiture appears to be inequitable.

An important provision of the third-party liability coverage concerns breach of conditions. Under Autoplan, a breach of conditions by an insured may lead to a forfeiture of indemnity. One example of a breach is conviction of driving while under the influence of alcohol or drugs. In such a case, ICBC may pay victims up to the limit of the impaired driver's coverage, but the corporation can then recover from the driver any monies paid out to the victims. Similarly, a driver is deemed to have committed a breach if he or she is convicted under the Criminal Code of Canada for actions related to an accident—although the innocent victims may still receive compensation. Such actions include criminal negligence, failure to remain at the scene of an accident, and dangerous driving.

In addition to the possible forfeiture of liability coverage, there are situations in which the present no-fault accident benefits may not be provided. A driver who is killed or injured in an accident may not be eligible, for example, if the accident was the result of suicide or attempted suicide, an attempt to avoid police action, participation in a race or speed test, or involvement in any unlawful trade or transportation. Other examples of ineligibility include situations where the driver is either unauthorized or unqualified to drive, or if the vehicle is owned by the federal government.

Limitation periods

A victim of an accident must bring an action within certain time limitations to obtain compensation. Under the provincial Limitations Act, an action against a wrongdoer must be brought within two years from the date the cause of action arose—which is usually the date of an accident. Failure to bring an action within this time limit may result in the victim losing the right to recover damages.

The Insurance (Motor Vehicle) Act provides for a shorter limitation period for actions against the corporation, which must be brought within one year from the date the cause of an action arose. This shorter period, however, does not affect actions against defendants in an automobile accident case, but it does affect application for Part VII accident benefits. A victim must bring an action for payment of these benefits within one year from the date of the accident, or within one year from the date of the last payment if the person was already receiving accident benefits.

1.3 The Compensation Process in British Columbia

Because ICBC has a monopoly on basic automobile coverage, it insures all parties involved in automobile accidents in British Columbia, except for non-residents and certain exempted vehicles. Most victims, therefore, whether innocent or at fault, deal with the corporation in the process of obtaining compensation.

This section summarizes the compensation procedures that innocent victims go through. The process by which wrongdoers obtain no-fault benefits (the only compensation they get) is not described separately since it is essentially the same as that for innocent victims.

It must be emphasized that the following is a generalization of the typical compensation process, and that each individual case is different. The purpose here is to outline briefly the basic steps involved and to show how the tort and insurance systems interact in the delivery of compensation.

1.3.1 PROCEDURES FOR INNOCENT VICTIMS

Innocent victims generally include injured drivers, pedestrians, and bicyclists not at fault in an accident, and all passengers. The compensation process for these victims almost always consists of five steps, and sometimes a sixth:

Notice of claim
Verification of coverage
Interim compensation
Investigation
Negotiation and settlement
Legal action and settlement

Notice of claim

A person injured in an automobile accident, or someone acting on the person's behalf, must promptly inform ICBC of the accident and injury. Policyholders are required to do so immediately. Since ICBC does not customarily receive police reports, a claim file is not usually opened unless a victim files notice. The notice—commonly initiated by a

phone call and subsequent interview—must include information about the policy, if the victim is a policyholder, and information about the accident.

Verification of coverage

ICBC verifies that the claim is covered by a policy, be it that of the victim or the alleged wrongdoer, and makes sure that all conditions of the policy have been fulfilled. As explained earlier in the report, the limit of potential liability coverage is either that of the alleged wrongdoer's policy, or $100,000 if the wrongdoer was uninsured or unidentified, or the maximum limit of the innocent person's own third-party coverage if he or she is an insured who purchased Underinsured Motorist Protection and has a higher liability limit than that in the wrongdoer's policy.

Interim compensation

Unless there is a breach or forfeiture, all victims are immediately eligible for no-fault accident benefits, which the adjuster assigned to the case determines according to Part VII of the Regulations of the Insurance (Motor Vehicle) Act. For innocent victims, the amount of the benefits paid is deducted from an subsequent liability settlement or damage award. If the case goes to trial, the amount of any future Part VII benefits included in the award is also deducted.

An adjuster handling a case seeks verification of previous employment to determine if it was of sufficient duration to meet the requirements entitling the victim to no-fault disability benefits. The adjuster may also require a certificate from the victim's doctor.

Arriving at a final settlement may take several years, during which time no-fault benefits may be the only compensation the victim receives. The adequacy of these benefits, therefore, and the efficiency of their delivery can be very critical to the person's well-being. Accident victims, whether policyholders or not, have the right to sue the corporation if they feel they are not receiving what is due to them under the Part VII regulations.

In addition to these no-fault benefits, adjusters also have

the authority, when liability is not in question, to provide innocent victims with advance payments of a portion of their probable liability settlement. As with no-fault benefits, advance payments are usually later subtracted from the final settlement.

Investigation

The adjuster assigned to a case attempts to reconstruct the events of the accident to determine who was at fault and to what degree. This assessment is based on the physical evidence, any police investigations, the rules of law or any precedents, and the statements made by the individuals directly involved and by any witnesses. The adjuster may also visit the scene of the accident and carry out other investigations if necessary.

Once fault is established, the adjuster estimates the amount of loss suffered by the victim, usually based on the expenses already incurred and information about the victim's injury and income. The attending doctor is asked to provide a report, and the injured person may be asked to undergo one or more medical examinations.

Negotiation and settlement

When a victim's injuries are clearly established and the adjuster has completed the investigation, the adjuster is usually ready to offer the victim a settlement. When more than one party is deemed to have been at fault, the settlement is apportioned to each party's policy according to the degree of fault. In the great majority of cases, settlement is reached at this point, or after additional negotiation if there is a disagreement about the degree of fault or amount of damages.

The compensation process ends with the payment of the settlement, at which time the victim must sign a release discharging the alleged wrongdoer from any further claim the victim may have as a result of the accident. The payment is made to the victim or often to the victim's lawyer (if there is one), who subtracts his or her fee prior to paying the balance to the client.

Occasionally a victim will come in a few days after an

accident, settle the claim, sign the release, and a short time later manifest a more serious injury. Having signed a release, the victim no longer has a legal claim. If the newly manifested injury is clearly the result of the accident, however, ICBC usually retracts the release and reopens the case.

The length of time it takes to settle a claim often depends on the nature of the injury. If it is a relatively serious injury, a victim is likely to (and often encouraged to) refrain from settling until completely recovered or until the condition has stabilized and future recovery can be plotted.

Meanwhile, adjusters usually try to settle a claim as soon as possible. On the surface, this may appear somewhat mercenary, since it has long been an assumption in the insurance industry that time generally plays against the insurance company's position in the adjusting process. The longer it takes to resolve a case, the larger the settlement is likely to be, if for no other reason than the accumulation of pre-judgement interest. Furthermore, delay increases the chance that a victim will engage the services of a lawyer, which is likely to result in a larger settlement with greater administrative and defence costs. Nevertheless, adjusters must determine whether a victim's welfare is really best served by delay and whether delay is creating additional hardships. The fact is that, under the fault system, an innocent victim may ultimately get more compensation by waiting, but may suffer more in the interim.

Legal action and settlement

Most cases are settled without the involvement of lawyers or formal legal action. But when a victim and the ICBC adjuster assigned to a case fail to reach agreement, and if the victim then seeks legal advice, the matter is usually referred to each party's lawyer. The case then enters the stage of legal proceedings.

Any victim has the right to seek legal assistance and to sue the motorist thought to be responsible for the injury. In a two-car accident, for example, injured passengers might sue both drivers. In cases of serious injury, many victims obtain legal assistance immediately after the accident.

Once lawyers are brought into a case, the adversary relationship between the victim and the corporation intensifies significantly. Up to this time, even if the preceding relationship has not been completely amicable, there was direct communication between the parties.

Adjusters have a responsibility to propose reasonable settlements based on court precedents—which is why they are wearing two hats at once, looking after the interests of both the victim and the corporation. From the time a victim retains a lawyer, however, a case takes on a more formal nature. The victim, henceforth, depends on the lawyer for advice and guidance, and most lawyers insist that all direct communications between the client and the corporation and its adjusters cease, and that all future transactions be conducted only through the lawyer.

This sudden change in the course of the compensation process—the product of a code of ethics that has evolved over the years—is not well understood by the public. As a result, victims may suddenly feel cut off from the corporation and their adjuster, seemingly without any explanation or justification. This may create additional resentment and frustration.

Furthermore, once a bodily injury case enters legal proceedings, ICBC, as the insurer, is required to defend an alleged wrongdoer (except in some circumstances when the wrongdoer was in breach of the Insurance (Motor Vehicle) Act). This aspect of the compensation process is also widely misunderstood, for it is a fact that while an innocent victim as the plaintiff must bear the cost of hiring a private lawyer, the policyholder being sued is represented by ICBC. This relationship is not apparent to most victims until they begin legal proceedings and find that ICBC is no longer helping them reach a settlement, but is now vigorously opposing them through its legal representatives.

It is the duty of lawyers involved in a legal proceeding to do the best they can for their client, maximizing the client's claim and minimizing the opposition's. Lawyers may dispute a case for up to three years or even longer. The legal process consists of the following steps:

1. ISSUANCE OF WRIT
   To commence a law suit, plaintiffs' lawyers, acting on their client's instructions, must issue a writ before the end of the two-year limitation period. If the writ is not issued in time or served within one year of its issuance, a suit against a defendant may not be able to proceed. The writ sets out the plaintiff's name, the defendant's name, and (as included in the endorsement of the writ) a brief description of the cause of action.
2. SERVICE AND DELIVERY
   The writ of summons is served by leaving a copy of the documents with the defendant.
3. FILING OF APPEARANCE
   In answer to the writ, defendants (represented by ICBC) must file an appearance within seven days signifying that they acknowledge the writ and will defend the case.
4. STATEMENT OF CLAIM
   Plaintiffs then file a document (if not included in the writ) describing in detail their claim against the defendant.
5. STATEMENT OF DEFENCE
   In reply, defendants file a statement of their defence against the action.
6. EXAMINATION FOR DISCOVERY
   In many respects, this is the most critical phase in the legal process. It is the first opportunity to examine a plaintiff's evidence, including the nature of damages incurred. During the examination, defendants' lawyers question plaintiffs, and plaintiffs' lawyers, if they choose to, can question defendants. All persons examined are under oath.
   The objective of the defence is to examine victims about the facts of an accident, their injuries, and their losses. Although there are clear rules about the way evidence may be taken, a defendant's lawyer is allowed to ask leading questions. The plaintiff's lawyer may object to a question and instruct his or her client not to answer it, whereupon the defence lawyer may go to a judge in chambers and ask for an order requiring an answer to the question, which may or may not be granted.
   The testimony is recorded by a court reporter and typed into a transcript, which usually becomes part of any subsequent trial proceedings.

Examination for discovery can be a gruelling experience for innocent victims, especially if they are still suffering from their injuries. Many say afterwards that they felt they were treated more like the guilty party than the innocent one, since the examination focused on the evidence regarding injury. After the examination, the parties have the opportunity to settle the claim before going to trial, and many cases are settled at this point.

7. TRIAL

Once a defence is filed, a trial date may be set, which is usually at least a year after the writ is issued, because of court backlogs. Either party can choose to have a trial by judge or jury.

In court proceedings, the burden is on plaintiffs to establish proof of their damages and, if necessary, the other party's liability. The trial consists of calling witnesses to testify to the facts of a case (including matters covered during the examination), plus the extent of damages. Witnesses are called to help determine loss of past and future income, medical and other expenses, the exact severity of the injury or disability, and the degree of pain and suffering or loss of amenities. Witnesses in addition to the victim may include doctors, employers, actuaries, and other relevant experts.

At the trial's conclusion, the judge or jury makes a decision on liability, or a split in liability where that is necessary, and decides the amounts to which the plaintiff is entitled under the applicable heads of damage. These decisions constitute the judgement. In a case where it is decided that the defendant is not liable, the plaintiff's case is dismissed. In a case where there is an apportionment of liability, the plaintiff receives a judgement for only a portion of his or her total damages—the portion the person was not at fault. Or the judgement may be that the defendant is totally at fault (which is often admitted), in which case the judgement will be for the full amount of damages.

Either party has the right to seek an appeal of the decision to a higher court.

1.3.2 LEGAL FEES

As is discussed later, legal costs are an important issue in the compensation of automobile accident victims since these costs are, in effect, subtracted from a victim's settlement. This is because there is no separate provision in court awards for a defendant to pay any but a small portion of the successful plaintiff's legal costs.

Hourly fees and disbursements

Lawyers traditionally charge for their time primarily on the basis of an hourly fee plus expenses, which are called disbursements. (As a matter of reference, not intended as guidelines, the Bar Association publishes a survey of typical hourly rates and typical fees charged for various kinds of jobs.) When a job is completed, lawyers present their client with a bill for time and expenses. This bill contains what are called solicitor and client fees.

Party and party costs

If a case involves litigation and the litigation is successful, plaintiffs' lawyers are entitled to "tax" (i.e., claim from) the losing side for their disbursements and a portion of their time, charged at a lower than actual rate, as set in the Supreme Court rules. This is called "party and party costs." When solicitors present their bill to a client, they show the disbursements and hourly fees at the solicitor and client rate, deduct the amount recovered through party and party costs, and bill the net difference.

The tariff for party and party costs, however, has not been updated in recent years and now represents an even smaller proportion of the actual solicitor and client fees likely to be billed in a case. Furthermore, lawyers who charge their clients on a contingency fee basis often do not deduct from that fee the party and party costs they have received.

Contingency fee contracts

Contingency fees, previously prohibited in British Columbia, were permitted by the legislature in 1969 and

have since become the practice followed in most automobile liability cases. They continue to be illegal in some jurisdictions, for example Great Britain and Ontario. Under English common law, contingency fees were forbidden because they were considered a form of champerty. Champerty is the act of someone assisting in a legal suit in which that person is not naturally interested, with the prospect of receiving a share of the disputed property if the suit is successful.

The advantage of the contingency fee system is that it provides a way for hard-pressed victims to obtain the legal services of an experienced personal injury lawyer without having to pay anything until and unless they win their case. Under this arrangement, lawyers agree to take an accident case subject to a written contract whereby the client agrees that the lawyer will retain a set percentage of the award as a fee, contingent upon the success of the case. Some legal firms vary the percentage they charge as their contingency fee according to the stage at which the case is concluded: more, for example, if it goes to trial rather than being settled before. Most firms, however, charge fixed percentages in the range of 20 to 35 percent.

Another recent change affecting legal fees is interim billing, where disbursements and time spent to date on a case are submitted to the client at regular intervals. But few victims suffering economic duress as a result of a serious injury or disability are prepared to add an extra sum to their monthly budget to support a legal case that may take three or more years to settle.

For this reason, and because they are unsure of what the total legal costs will amount to, most victims of serious injury are willing to sign contingency fee agreements. In addition, because these victims are usually able to obtain legal services on a contingency fee basis, public legal assistance is not available to them.

PART TWO

The Purpose of Compensation

The Purpose of Compensation

Security should be the purpose of compensation

The majority of the committee's members believe that the fundamental purpose of the compensation system should be to provide persons injured in automobile accidents with a security of just compensation for the economic losses they suffer.

We have singled out six criteria which we believe must be satisfied to achieve security of just compensation. These criteria quite naturally overlap since most aspects of compensation are closely interrelated. Nevertheless, it is useful to examine them separately in order to evaluate the performance of the present system and identify desirable improvements.

The six criteria are:

Adequacy
Timeliness
Efficiency
Equity
Compassion
Intelligibility

2.1 Criteria For The Compensation System

Adequacy

Indemnity should be adequate to compensate victims for their real economic losses and to provide for their needs. Neither victims nor their families should have to thrust themselves as a burden on society because of their losses. The hardships suffered by victims should not be compounded by economic insecurity.

Timeliness

The compensation victims require should be provided to them when they need it. The disbursement of money should be directly related to their needs. Accident victims should receive necessary assistance as soon as possible following their injury and should receive future compensation as they are entitled to it, without delay.

Efficiency

The compensation system should operate in an economically efficient manner, delivering the maximum reparation possible from the funds available. The overall compensation fund should exist principally to provide compensation to victims. Any secondary expenses necessary to process compensation should be kept to a minimum.

Equity

Money from the compensation fund should be allocated to victims on an equitable basis so that the amount they receive corresponds proportionately to their needs. All victims should have their economic needs taken care of, but some advantage should be accorded to innocent victims in regard to non-economic losses.

Compassion

Accident victims should receive humane, caring treatment in whatever ways they come in contact with the compensation system. The system should provide assistance without subjecting persons already injured to any undue, unpleasant experiences.

Intelligibility

The compensation system should be simple and straightforward so that it is understood, in theory, by the general public and, in practice, by claimants. Furthermore, the procedures should be clear enough that they do not confuse or mislead accident victims, who already have enough to contend with.

MINORITY VIEWS

Minority views regarding the purpose of compensation are presented in the following section.

2.2 Other Issues

In arriving at what we believe should be the criteria for a compensation system, it was necessary to examine several other aspects which are sometimes also considered essential, but which we think are not necessarily so.

2.2.1 THE RIGHT TO SUE

As is made apparent later in this report, the majority of the committee's members believe that to satisfy the criteria described above it would be necessary to substantially extend no-fault benefits and limit the right to sue for economic losses under tort law. In other words, victims would not need to prove someone else's fault (and, if necessary, sue) in order to gain reparation for their economic losses. These would be compensated regardless of fault, leaving only non-economic losses to be compensated through tort action.

This proposed reform, however, raises a fundamental question: Is the security of compensation more important than the right to sue?

Social priorities favour security for victims

If a society set out to plan a thoroughly just compensation system, it would probably not design one like that which our society has inherited. The present system for compensating victims of automobile accidents is the result more of default than of plan. It is a system that combines the complexities of the insurance business with the formalities of tort law that had evolved prior to the existence of automobiles.

As was pointed out earlier, legislatures have gradually modified the laws to mitigate the restrictive influence the negligence principle has on the ability of victims to gain compensation from insurance. The judiciary has also had a mitigating effect insofar as the body of its decisions have formed precedents favouring the victim's position.

These moves by both lawmakers and judges have reflected changes in society's attitudes. Public opinion appears to have shifted as people have increasingly come to look upon their

insurance as a form of security available to them if they are in need, rather than something to protect them if they are sued by someone else. It is difficult to say which came first, new public attitudes or changes instituted by judges and legislatures, since everyone is part of the same public. In any case, society seems to be increasingly sensitive to the still unresolved problems that arise from the marriage between automobile accidents and the entanglements of insurance and liability law.

To the extent that the liability nature of the present system compromises its ability to provide compensation, the system fails to provide what society perceives as its purpose. Most people expect that automobile insurance protects them and their family against the serious losses they might suffer if they are injured or killed in a motor vehicle accident. What most people do not see is that the ability of this insurance to actually provide reparation is significantly limited by its basic interrelationship with tort law. The fundamental dilemma—the fact that automobile insurance is not primarily an instrument for compensation but a protection from liability—has not been resolved.

Security of compensation and the right to sue

The committee believes that the right to sue for economic losses is not, in itself, an essential feature of a just compensation system and that the security of compensation for these losses is, ultimately, more important.

We recognize the gravity of recommending the abridgement of a traditional right. Nevertheless, if the right is replaced with something even more highly valued, in this case the assurance of just compensation, then the majority of this committee believes that the exchange may be a desirable one. Moreover, if all victims recover their economic losses, there is no need to sue for them.

As is discussed in Part 4 of this report, this would not be the first time that tort has been limited in British Columbia in favour of guaranteed compensation. Furthermore, no-fault automobile accident compensation is not a totally new

institution in this province, nor in many other jurisdictions throughout the Western world.

Nevertheless, we do not advocate the complete abolition of the right to sue in cases of automobile accidents. We are recommending that this right be curtailed to the extent that economic losses can be more readily and fairly compensated outside of the legal system.

MINORITY VIEWS

Most members of the committee agree that the assurance of compensation for economic losses is more important than the right to sue, although we vary in opinion as to the degree that tort action must be limited in order to provide better reparation. One committee member doubts that society considers the assurance of compensation to be more important than the right to sue. He does not believe so himself. Furthermore, he believes there is no conflict between the two since tort action is, and should remain, the principal means for obtaining compensation. A second member believes that the assurance of compensation for economic losses is more important than the right to sue only in the case of care and rehabilitation expenses, not income loss. Two other committee members believe that if the present system falls short of satisfying public expectations it is for reasons other than those stated in the report.

2.2.2 RETRIBUTION

Retribution for injury is a strong emotional impulse, but it should not be mistaken as one of the criteria for a compensation system.

Following an accident, particularly a serious one, it is not uncommon for an innocent victim to want revenge. Retribution is a natural human instinct, and its place in the evolution of justice is well established.

Revenge does not accomplish compensation

Nevertheless, it is inappropriate to expect the compensation system to satisfy a desire for vengeance or punishment.

Any tendency to connect compensation with revenge comes from a basic misunderstanding of the nature of the compensation system.

To begin with, the purpose of the system is to compensate victims for their losses. While it might be argued that retribution against the perpetrator of an accident could make an innocent victim feel better, this does not provide any tangible compensation for the victim's tangible losses.

It is tempting to conclude that retribution will at least be satisfied if the innocent takes the wrongdoer to court. But, as is pointed out later, the adversary situation is probably far more cruel to the innocent than it is to the wrongdoer.

Even when defendants are found to be in the wrong, no retribution is truly accomplished in the present system. As was discussed in Part 1, wrongdoers do not pay the court award in the vast majority of cases—ICBC does. Therefore, compensation usually does not come out of a wrongdoer's pocket, but out of the insurance fund to which everyone contributes, including most victims themselves.

Moreover, it is the feeling of this committee that a victim's desire for revenge, if it exists at all, usually fades fairly quickly, to be replaced by the desire for comfort, recovery, and support. And these are the real aims of compensation.

2.2.3 ACCIDENT PREVENTION

Compensation is not a means of deterrence

In another issue, closely related to that of retribution, it is sometimes believed that the risk of being sued under the tort system deters reckless driving.

By definition, however, a deterrent is something that occurs in advance to prevent an event or make its occurrence unlikely. Therefore, the seriousness of being found liable must be clearly in the mind of potential wrongdoers to discourage them from doing harm. But liability is not very severe for wrongdoers since their insurance usually pays the damages. Indeed, the purpose of liability insurance is precisely to protect wrongdoers from financial punishment arising out of tort.

Judging by the driving behaviour common today, deterrence of any kind is inadequate. Before and while they are driving, most people simply do not think that they may have an accident, and few are willing to consider that they might ever be at fault.

While the emotional shock of actually causing a serious accident might act as a deterrent to subsequent bad driving by a particular wrongdoer (although the large number of repeat offenders suggests that even this is questionable), it is clear that tort does not act as a deterrent for society at large.

MINORITY VIEWS

One member of the committee, while agreeing that tort itself probably does not act as a deterrent as defined in this report, believes that doing away with tort—which would receive a fair amount of publicity—might have a reverse psychological effect in that people might then assume that responsibility for bad driving has been reduced. He believes that, at present, although responsibility for possible accidents may not be in the minds of drivers as they drive along, they may nevertheless drive more slowly, not run red lights, not turn left against opposing traffic, and so on, because of a general sense of responsibility—which, overall, has a beneficial affect on the accident rate. The same committee member also believes that tort is an important expression of social disapproval of unacceptable conduct, and is therefore an important feature of the overall compensation system.

Insurance rating has some effect as a deterrent

If the tort system has any significant effect as a deterrent, it is principally in its interaction with insurance: when drivers are found at fault in any claim, whether injury was involved or not, their premiums increase. The justification for making people who cause accidents pay higher premiums is that they have demonstrated they are greater risks and, therefore, place a potentially greater burden on the insurance fund. Under the corporation's new Claim-Rated Scale, rates for drivers with several at-fault claims will go up much more dramatically than before, and motorists with claim-free records will pay less.

Premium adjustments act as a deterrent for a broad segment of the population since nearly all automobile owners pay for insurance every year. There is both an incentive for motorists to maintain a claim-free record and a penalty for those who cause accidents. But while premium adjustments are a good deterrent for society at large because they affect many people, making individuals responsible for compensating personal injuries is not an effective deterrent because only a comparatively small number of motorists are affected by it. And even then, insurance usually intervenes to counteract the penalty imposed by large tort settlements.

Furthermore, it is not necessary to retain tort to determine fault for the purpose of rate classification alone. Discrimination against drivers with bad records can continue (with the right of appeal also continuing) whether or not compensation is based on fault.

Enforcement is the most immediate deterrent

The committee feels that law enforcement is the quickest and most effective way to change driving behaviour. Fines should be more severe, and seat belt use should be strictly enforced.

Penalties for liquor-related driving offences should also be more severe. There is no question that alcohol is a major contributing factor in causing automobile accident injuries. Society should show less mercy to drunk drivers.

Nevertheless, we must accept the fact that stronger penalties alone will not work. Stronger penalties must be coupled with a greater risk of apprehension. Without this perceived risk, most bad drivers may continue their habits without fear of the consequences.

Additionally, larger criminal penalties should perhaps be augmented with a range of more moderate punishments since courts often seem reluctant to give out a very harsh penalty, particularly if the guilty party is a first-time offender. Even with more moderate punishments, however, courts often seem reluctant to take away, for example, someone's right to drive if driving is necessary for that person to earn a living. Another problem is that the more severe a

penalty, the more likely it is that an accused will spend the money necessary to get the services of a better lawyer, and so avoid conviction.

Although we firmly believe that penalties for bad driving should be more strict and apprehension more sure, we must acknowledge that the intent for greater enforcement is much easier than its achievement. It is one thing to want to get bad drivers off the road; it is another to afford the enforcement that might be necessary or to expect the justice system to act far more firmly than it does now.

Nevertheless, we hope to see stricter enforcement so that law-abiding driving becomes the rule of the day, and dangerous driving becomes an absolutely unacceptable social behaviour. In looking at the tragic situation of many accident victims, we know the ultimate solution would be to drastically reduce the basic cause of the problem—accidents. While that is the hope, we must be realistic enough to recognize that this will be difficult, and that accidents will continue to some degree as long as there is an automobile culture. The mandate of this committee, while it does not prevent us from commenting on any aspect of automobile accidents, is to focus on the plight of accident victims. Enforcement may reduce the need for compensation in some better future, but the need will surely persist.

MINORITY VIEWS

Several committee members see an opportunity to significantly reduce accidents and injuries—and thereby reduce compensation problems—by increasing the enforcement of seat belt use and by raising the ages for both drinking and driving. The majority of the committee believe, however, that insufficient seat belt use and impaired driving are problems that require long-term solutions, while compensation problems require immediate solutions. As for raising the ages for drinking and for driving, several committee members believe this would be unfairly discriminatory since there are irresponsible and unsafe drivers of all ages.

Safety education may accomplish long-term goals

Another hope for improving driving behaviour in the future is through traffic safety education programs. ICBC has embarked on a major project to develop a systematic and comprehensive approach to traffic safety education. One of the principles underlying this program is that significant changes in normative social behaviour are required in order to improve widespread driving patterns.

The corporation, in partnership with the Ministry of the Attorney-General, also sponsors the CounterAttack program against driving while under the influence of alcohol.

Although the issue of safety itself is not part of the committee's mandate, improved driving behaviour would clearly reduce the need for accident compensation. We therefore commend ICBC for its efforts in traffic safety education and encourage the corporation to persevere in its commitment.

In a related matter, the committee supports further efforts to improve the safety features of both the driving environment (primarily roads and signs) and automobiles themselves. Just as the corporation has taken a firm stand on safety education, we believe it should possibly also take a public stand on improved automobile safety standards, considering the impact this might have on reducing injuries, and thus on the need for compensation.

PART THREE

Evaluation of the Present System

Evaluation of the Present System

In this part of the report, we use the criteria established in Part 2 to evaluate the present system of automobile accident compensation. Although we are addressing the operating principles and overall performance of the whole system, the problems we identify are most evident in cases of serious or catastrophic injury. These cases are a small percentage of all injuries, but they represent a large percentage of the total compensation dollars provided through the insurance fund. They also represent the people who suffer the most from injury and from shortcomings in the compensation system.

The concluding section of this part reviews the findings of several public attitudes surveys sponsored by the committee.

3.1 Adequacy

Indemnity should be adequate to compensate victims for their real economic losses and to provide for their needs. Neither victims nor their families should have to thrust themselves as a burden on society because of their losses. The hardships suffered by victims should not be compounded by economic insecurity.

Rather than examine the entire issue of adequacy, this section addresses only the narrower question of whether the amounts of reparation now provided under Autoplan are large enough. Subsequent sections of Part 3 examine other questions that relate to the wider issue of adequacy, including the system's timeliness, efficiency, and equity. Here we address only the quantitative performance of the present compensation system in providing both liability and no-fault benefits.

TABLE 3.1

Minimum Third-Party Liability Insurance In Canadian Provinces and Selected American States

Canadian Provinces (as of May 1, 1983)	**Minimum Limit** $
British Columbia	100,000
Alberta	100,000
Saskatchewan	100,000
Manitoba	200,000
Ontario	200,000
Quebec (Note 1)	50,000
New Brunswick	100,000
Nova Scotia	100,000
Prince Edward Island	100,000
Newfoundland (Note 2)	200,000
Northwest Territories	50,000
Yukon	200,000

Selected American States (Note 3) (as of July 1, 1982)	$
Washington	25,000/50,000/10,000
Oregon	15,000/30,000/ 5,000
California	15,000/30,000/ 5,000
Michigan	20,000/40,000/10,000
New York	10,000/20,000/ 5,000
Florida	10,000/20,000/ 5,000

Note 1: The limit applies to property damage within the province. Outside the province, the limit (covering both property and injury liability) is adjusted automatically to the minimum limit applicable in the particular jurisdiction.

Note 2: As of October 1, 1983.

Note 3: Unlike Canada where global limits apply, the minimum limit in most American states is divided between injury to one person, injury to two or more persons, and property damage.

Source: *Relevant provincial and state authorities. Summary of Selected State Laws and Regulations Relating to Automobile Insurance, American Insurance Association, 1982.*

3.1.1 LIABILITY COVERAGE

The minimum limit is too low

Innocent victims of traffic accidents are now assured a minimum of $100,000 legal liability coverage, against which they can negotiate or sue for damages. Although this limit is higher than any in the United States, it is equal to or lower than those in most of Canada (see table 3.1). In any event, B.C.'s limit is inadequate coverage for serious accidents involving either catastrophic injury or more than one victim.

Fortunately, most B.C. motorists have been convinced of the desirability of carrying more than the minimum liability limit, and nearly half have also taken the option of purchasing Underinsured Motorist Protection (see table 3.2).

TABLE 3.2

Purchase of Optional Third-Party Liability Coverage

British Columbia, 1982

Liability Limit		Distribution of Insureds
$		%
100,000	(minimum)	12.0
200,000		3.1
300,000		2.6
500,000		24.3
1,000,000		55.3
2,000,000		1.8
3,000,000		.2
5,000,000		.5
10,000,000		.2
Total		100.0
Underinsured motorist coverage		48.0

Source: *ICBC internal data.*

Therefore, although the current compulsory liability limit is itself inadequate, many British Columbians when injured have a high limit of indemnity available to them, if they qualify for it—that is, if they are totally or partly innocent and are able to prove their case. There are, however, several serious exceptions to this situation. Victims without Underinsured Motorist Protection may not be adequately protected in accidents where the wrongdoer has only the minimum or near minimum liability insurance or, similarly, in hit-and-run accidents. Additionally, few people carry adequate levels of liability insurance to provide for very serious accidents where there is more than one serious injury or even one catastrophic injury.

TABLE 3.3
Distribution of Third-Party Bodily Injury Claims By Third-Party Liability Limit
British Columbia, 1982

Third-Party Liability Limit	Percentage of Bodily Injury Claims
$	%
100,000	6.3
200,000	2.2
300,000	2.2
500,000	24.2
1,000,000	58.9
2,000,000	1.9
3,000,000	.2
5,000,000	.5
10,000,000	.3
Sub-total	96.7
Underinsured motorist coverage	.1
Uninsured motorist and hit-and-run claims	3.2
Total	100.0

Source: *ICBC internal data.*

Accidents where the wrongdoer is underinsured are less common now than in the past, judging from the relatively low percentage of claims against policies with only minimal coverage (see table 3.3). The reason for this may well be that, prior to ICBC's FAIR program, motorists who had to pay higher premiums because of various discriminatory factors, such as age and sex, tended on average to have a lower level of liability protection. Although this trend has apparently been reversed, there are still a significant number of claims in which the wrongdoer has less than a $300,000 limit, including those cases of uninsured and hit-and-run accidents. Nevertheless, most people have recognized the value of paying relatively little in extra premiums for considerably more coverage. Since 1974, the average third-party limit purchased has increased by 250 percent, from $223,000 to $787,500 (see table 3.4).

TABLE 3.4
Trend In Purchasing of Optional Third-Party Liability Coverage

British Columbia

Liability Limit	1974	1982
$	%	%
50,000 (min. in 1974)	8.6	n/a
100,000 (min. in 1982)	34.3	12.0
200,000	32.1	3.1
300,000	11.9	2.6
500,000	9.3	24.3
1,000,000	3.8	55.3
2,000,000	n/a	1.8
3,000,000	n/a	.2
5,000,000	n/a	.5
10,000,000	n/a	.2
Total	100.0	100.0
Average Limit	$223,000	$787,500

n/a: Coverage not available.
Source: *ICBC internal data.*

Awards do not necessarily match needs

Even victims who theoretically have enough third-party coverage available to them may still not receive an award that corresponds to their needs because of the lump sum system of awards. Under liability insurance, a settlement or award is determined in advance of most of the needs and is usually paid in one lump sum when the case is settled.

It is true that by the time a settlement is reached, a victim will have suffered some measurable losses in income and in care and rehabilitation, as well as non-economic losses such as pain and suffering. The award will cover this amount. Nevertheless, a portion of the award—and a large portion in cases of serious injury—is usually designed to meet a victim's future needs: all the support that will be required in future years, as long as and to the degree that the victim is disabled, including income support, care and rehabilitation, and compensation for pain and suffering.

The courts must frequently estimate a victim's future needs over long periods of time—often 40 or more years. No one can accurately predict what a victim will need over even a shorter period of time, given the unpredictability of such factors as future inflation, future medical improvements, the victim's health and possible recovery or decline, the victim's lifespan, and so on. Courts do the best they can estimating future needs. They draw on the advice of many experts—including doctors, economists, and actuaries—and use the best available means to determine a fair and accurate award.

But the accuracy of awards is illusory. For one thing, no one ever lives out an absolutely predictable course (see table 3.5). One may live longer than the average life expectancy that a particular condition might suggest, and therefore not receive enough for his or her actual lifetime, even assuming that the award keeps up with inflation and ongoing needs. Another victim may receive too much if he or she ends up living fewer years than predicted. As for compensating such things as pain and suffering, these are even more difficult to quantify since they constitute not monetary losses, but intangible losses for which the courts must try to assign a value.

TABLE 3.5

Variation In Life Span For 100 Individuals Aged 25

	Male	Female
Number living at age 25	100	100
Will live to be exactly 75 (approximate life expectancy)	3	2
Will live to less than age 50 (life expectancy less 25 years)	7	4
Will live to between age 50 and 65	17	10
Will live to between age 65 and 85 (life expectancy plus or minus 10 years)	55	45
Will live beyond age 85	21	41

Source: *Statistics Canada, B.C. Life Tables, 1975-77.*

It is sometimes argued that, through tort, the present system at least attempts to deal with each case individually, and that this is preferable to assigning pre-determined levels of compensation according to specific types or amounts of loss. While this argument may be true for pain and suffering awards, it does not hold up when it comes to compensating economic losses. Here the present system fails to deal truly individually because individual needs vary over the future course of a disability.

MINORITY VIEWS

Several committee members feel that awards for income replacement are as accurate as they need to be, and one member feels they are often too high; but all of the members believe that the courts do as well as can be expected at predicting the future needs of victims. One member believes that it is definitely preferable that future requirements for each individual be determined by the courts rather than being arbitrarily determined by a bureaucracy, even if that bureaucracy has the opportunity to adjust future payments to match needs as they arise. This member also questions the very use of the word "needs" in this report because he believes it is nct an easily ascertainable or definable entity.

3.1.2 NO-FAULT COVERAGE

Measured by money alone, the present no-fault benefits provided by Part VII of the Regulations of the Insurance (Motor Vehicle) Act clearly are not adequate. Few individuals, let alone their families, could survive adequately on a weekly maximum of only $100. Present death benefits hardly make up for the economic hardship suffered from the loss of a head of household or spouse. In the area of care and rehabilitation, the $100,000 maximum is not enough to provide adequately for the lifetime of a very seriously and permanently disabled person.

These so-called no-fault benefits, however, can not be completely measured in terms of money alone, since except for wrongdoers they were not intended to be the only source of accident compensation. For the innocent, they were designed to provide interim relief pending resolution of liability, thereby alleviating the severe hardship of the lengthy delays that occur before the fault system completes its course. For wrongdoers, these benefits were designed to provide a modicum of compensation so that neither they nor their family would necessarily have to resort to welfare.

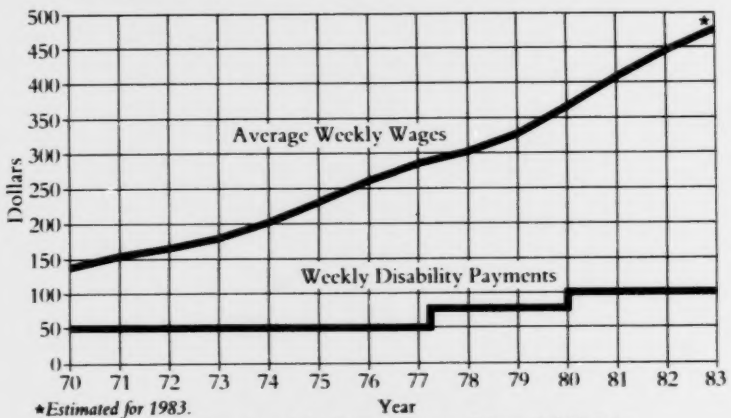
Current weekly benefits are inadequate

Measured by these objectives, are the present no-fault disability payments adequate? One thing that can be said for certain is that they have not kept up with increases in average B.C. wages. From 1970 to 1983, the level of wages in the province (as measured by Statistics Canada for average weekly wages in the industrial composite) increased by approximately 248 percent, whereas in the same period, the amount of weekly disability payments increased by only 100 percent (see graph 3.1). To the extent that these benefits have fallen behind in real dollars, victims (innocent and wrongdoers alike) are not getting as much as was originally determined they should.

Furthermore, since benefits are not adjusted to reflect increases in the cost of living, the value of a particular individual's benefits decreases with time (see table 3.6). Finally,

compared to other Canadian provinces, B.C. has fallen behind most in the level of weekly disability payments provided (see table 3.7).

GRAPH 3.1
Average Weekly Wages and Weekly Disability Payments
British Columbia, 1970 to 1983



**Estimated for 1983.*
Source: *Statistics Canada and the B.C. Insurance (Motor Vehicle) Act Regulations 1 to 32.*

TABLE 3.6
Loss of Purchasing Power of Weekly Disability Payments

Year of Accident	Amount of Benefit	Constant Dollar Value in							
		1975	1976	1977	1978	1979	1980	1981	1982
	$	$	$	$	$	$	$	$	$
1974	50	45	41	37	35	32	30	26	23
1977	75	—	—	75	70	65	59	52	47
1980	100	—	—	—	—	—	100	87	79

Note: The weekly amount of disability payment is set by the Insurance (Motor Vehicle) Act Regulations, and each victim receives the amount in effect at the time of his or her accident, despite later increases.
Source: *Based on Consumer Price Index, Statistics Canada.*

For wrongdoers and their families (unless they have other sources of compensation, such as personal or family wealth, disability insurance, or charity), insufficient no-fault benefits mean they may have to draw on other funds provided for by society—namely, welfare. Even for innocent victims awaiting uncertain liability settlements, the interim relief provided is so inadequate that many have to use all available personal savings and even possibly sell off personal property. As generous as the present no-fault benefits seem to be, they do not provide a basic level of subsistence.

TABLE 3.7

Disability Payments In No-Fault and Accident Benefit Coverages In Canadian Provinces

Province	Amount of Disability Payments	Maximum Duration
(as of May 1, 1983)	$ per week	
British Columbia	100	lifetime
Alberta	150	104 weeks
Saskatchewan	150	lifetime
Manitoba (Note 1)	70% gross earnings minimum 150 maximum 300	lifetime
Ontario (Note 2)	140	lifetime
Quebec (Note 3)	90% of net income (up to gross ceiling of $29,000 per yr.) minimum 130	lifetime
New Brunswick	140 (eff. Sept. 1/83)	lifetime
Nova Scotia	140 (eff. July 1/83)	lifetime
Prince Edward Island	35	104 weeks
Newfoundland	35	104 weeks
Northwest Territories	50	104 weeks
Yukon	150	104 weeks

Note 1: Total disability benefit.
Note 2: Benefit payable to employed victims.
Note 3: Quebec has a total no-fault compensation system.
Source: *Relevant provincial authorities.*

3.2 Timeliness

The compensation victims require should be provided to them when they need it. The disbursement of money should be directly related to their needs. Accident victims should receive necessary assistance as soon as possible following their injury and should receive future compensation as they are entitled to it, without delay.

There are two questions about the issue of timeliness: do victims receive the financial help they need without delay; and does the lump sum method of paying awards suit the timing of victims' needs? The first question concerns victims that might be left in the lurch before an award is made, and the second concerns the scheduling of payments after an award is made.

3.2.1 DELAYS IN COMPENSATION

Award delays impose severe hardships

Most claims are small and are settled quickly (see table 3.8). But for seriously injured victims, the interval before their claim is settled is frequently as long as three or more years, during which time their whole economic way of life can be dramatically altered. This is one of the most serious problems characterizing the current compensation system.

Delays impose severe hardships on many victims, creating anxieties and uncertainties about how much help a person can ultimately expect, if any. These anxieties can, in turn, worsen a victim's physical and emotional problems and even impede actual recovery.

Delays are inherent in the fault system

Delays are inherent in the fault system because compensation is not provided automatically when it is needed, but only after liability is determined. Until a final award is made or a settlement reached, victims are not entitled to any compensation in British Columbia, other than limited no-fault benefits.

The final settlement is so final that some victims' entire future security may hinge on it. Therefore, it is normal, and

understandably prudent, to delay court action or a negotiated agreement until a victim's injury is stabilized to the point that one can determine as complete and accurate an award as possible. In addition, because of the adversary relationship between the insurer and a victim or the victim's lawyer, delaying tactics by one side or the other are often a part of the bargaining process. The unfortunate victim is caught in the middle, pressed to wait until the injury is stabilized, though probably in urgent need of money.

TABLE 3.8
Time Lag to Closure of Third-Party Bodily Injury Claims
British Columbia

Time Period	Percent of Claims Settled During the Period			
	1974 Claims	1975 Claims	1976 Claims	1977 Claims
	%	%	%	%
Same year	55.4	53.2	55.4	57.9
1st following year	22.2	24.9	25.7	26.0
2nd following year	12.2	11.8	11.4	7.9
3rd following year	5.6	6.3	3.8	4.3
4th following year	2.9	2.0	1.9	1.7
5th following year	.8	1.0	.8	1.3
6th following year	.4	.3	.5	—
7th following year	.2	.3	—	—
8th following year	.1	—	—	—
Outstanding	.1	.2	.5	.9
Total	100.0	100.0	100.0	100.0

Source: *ICBC internal data.*

Even after lawyers finally take a client's case to court, there are often court delays. Following issuance of the writ, which must be filed within two years of an accident, most cases will probably not be heard for a year or longer, due to the usual backlog in court schedules.

The serious problem of delays has long been recognized. In fact, the original purpose of British Columbia's no-fault

benefits was to provide innocent victims with interim relief pending the settlement of their liability claim. These benefits were introduced in the early 1970s and continued under Part VII of the regulations governing Autoplan. As pointed out in the previous section, however, these benefits are woefully inadequate to provide for an individual, let alone a family.

Advance payments are not provided often enough

Insurance companies can help victims overcome the problem of delays by providing advance payments against an eventual liability settlement. Obviously, an insurer will only make such payments when there is virtually no doubt that the victim will be entitled to a settlement.

In the past, private insurance companies rarely made advance payments because it was assumed that they would encourage claimants to finance lawsuits and further delay settlements. In effect, the financial hardship of claimants was sometimes used to pressure them into settling more quickly. It is a customary practice in the insurance business to close a file as soon as possible to reduce a company's unknown future liabilities, to prevent claimed losses from increasing, and to stop the accumulation of the pre-judgement interest that will be added to the final award.

Nevertheless, some private insurers initiated a policy of making advance payments because they discovered that these payments actually encouraged claimants to be more cooperative. Improperly used, however, advance payments can become another tool adjusters can use to reduce final settlements. These payments should be made primarily to help victims feel better and deal more successfully with their economic needs; improved cooperation should be a desirable, but only secondary, by-product.

When liability is not in question, advance payments make a lot of sense for both victim and insurer. Although ICBC has a policy of making these payments, it is not required by law to do so. There is no provision in the Insurance (Motor Vehicle) Act defining advance payments or guaranteeing their subtraction from final settlements. Nevertheless, the corporation may offer advance payments, subject to a

claimant's written agreement that the money will be subtracted from any final settlement and will not prejudice the outcome of the case.

The committee believes, however, that advance payments are not being made frequently enough. The reason may be that some insurance adjusters are not inclined to provide money before a case is resolved. Many adjusters have either come from private companies or have been trained by those who have, and they cling to the practice of holding back payments until the final settlement is reached, despite the corporation's policy of providing advance payments.

It would be a mistake to conclude that delays are only a problem because of the current administrative bureaucracy. Although there undoubtedly are instances of unjustified bureaucratic delay, the fundamental problem arises out of the very nature of the fault system, where the settlement of compensation depends on the tactics inherently employed in an adversary situation.

We recognize, as well, that some victims could exploit advance payments to avoid returning to work. Some might use these payments to extend the limitation period on claims, and thus the date of final settlement; or even use them to finance unmeritorious lawsuits—although the latter seems unlikely with the widespread availability of contingency fee arrangements. There are also cases where injuries are not clearly manifested or are psychological in nature, and are thus difficult to quantify. So while adjusters should make every effort to provide advance payments whenever justified, it is also their responsibility to evaluate actual needs and ensure as much as possible that there is no abuse.

MINORITY VIEWS

All but one of the committee's members agree that delay is one of the most serious problems in the present compensation system. The one member who disagrees believes that the principal cause of delays is not the procedural tactics employed by plaintiffs' lawyers, but that the corporation does not push cases ahead actively enough once a writ has been issued. He also feels that the problem of delays could be

sufficiently resolved if the corporation took a more compassionate and expeditious approach to granting advance payments.

A second committee member believes that advance payments are commonly made and that the cause of delays, therefore, is not the lack of these payments. Several other committee members believe that some lawyers are unfairly delaying procedures in order to build up pre-judgement interest.

3.2.2 LUMP SUM PAYMENTS

The second issue regarding timeliness is how effective the present system is, once awards are made, in providing compensation when it is needed. Because of the nature of the fault system, the usual practice is to make a single lump sum payment as soon as the case is settled, either in court or by negotiated agreement. This closes the case, and in the eyes of the law, the victim has been thoroughly compensated. But do lump sum payments really provide timely compensation, particularly for victims of serious injury?

There is no way to guarantee that a lump sum payment will be managed so that the proceeds from it will, in fact, be properly applied over the lifetime of the victim or for the duration of the disability. Furthermore, even if a lump sum award is successfully managed, its original size is based on an estimate of future needs and so may not correspond to what actually happens in the future.

The committee has specifically considered three situations in which the lump sum method of compensation may create problems: squandering, mismanagement, and inheritance.

Squandering of large awards is apparently uncommon

There is always the possibility that someone who suddenly receives a large sum of money may squander it quickly. Squandering by people who win lottery prizes, for example, is not uncommon. A compensation award, though, is not like a lottery prize since it is not an unexpected boon but a critically important fund meant to provide for a person's future livelihood. Nevertheless, it is commonly

believed that some victims are unable to prevent the dissipation of their award soon after they receive it. When dissipation occurs, victims might, in effect, receive double indemnity since they may get a second round of compensation in the form of social assistance.

Even though squandering is always a possibility, depending on the particular person concerned, the committee has concluded that it does not appear to be a common occurrence. This conclusion is based on a survey of victims of catastrophic injury. The findings of this survey are discussed in section 3.7.

Victims may mismanage their funds

Although it appears that victims are inclined to protect their funds, there is no way to guarantee that they will use the money precisely for what it was intended—compensation for care, rehabilitation, and income replacement. If a victim uses an award to buy a house, for example, does this adequately provide for future needs? The committee has reached no consensus on this matter, but the majority of us believe that misallocation of the compensation award may be fairly common. Furthermore, it is difficult to make the most out of a large sum of money. It is not easy for the average person to establish an investment portfolio sophisticated enough to ensure an adequate, regular income spread over many years.

Compensation is not designed to build an estate

When an accident victim dies of causes totally unrelated to an automobile accident, the lump sum award previously received passes on to the person's estate. Is this fair?

One might argue that a compensation award should be no different from any other money people pass on to their survivors. Compensation, however, is not just any sum of money. It is drawn from a fund specifically established to provide indemnity against liability for the losses suffered solely as a result of automobile accidents. The fund should not provide for a person's customary provisions for his or her survivors, such as life insurance or the building of an

estate. Therefore, when survivors collect compensation money left after a victim's death due to causes unrelated to the accident, it is a misallocation of the compensation fund, since it is money that could otherwise go to help other victims.

Lump sum awards may not match actual future needs

The basic problem with the lump sum method of payment is that it cannot accurately reflect what the future needs of a victim will actually be. One may die sooner or live longer than was anticipated when the award was determined. A condition might improve or it might worsen. Medical advances could help a condition and make future care less costly than anticipated; or, just the opposite, more expensive medical advances may not be accessible to a victim because their cost was not anticipated. In addition, there is also the unknown effect of future inflation and the future cost of living.

Similar uncertainties apply in cases where a victim dies. The lump sum provided to a surviving spouse is supposed to replace the amount of benefit he or she would have received as support from the deceased. But how has compensation served this purpose if the spouse remarries or dies prematurely? Although courts have recently begun to reduce such awards on the contingency of remarriage, it is still an exercise in second-guessing the future.

In summary, lump sum awards are inevitably based on assumptions about the future, whereas the actual future needs of a victim can only be met appropriately as they occur in real time. Under the present tort system, interim compensation provided before an award is made is often too little or lacking altogether; and the final award itself, delivered in a single lump sum, does not necessarily relate to a victim's needs as they continue to occur into the future.

MINORITY VIEWS

Some committee members suspect that the potential squandering of lump sum payments may actually be a widespread problem, despite the apparent conclusions from the

committee's survey of victims of catastrophic injury.

Several members believe that, no matter what may happen, it is perfectly proper for victims to have complete control of their award immediately from the time it is made. The award, they argue, is to replace a lost asset. How victims spend their award and who inherits it should be their own business, just as it would be with any other personal asset. Furthermore, they add, it may be difficult for disabled persons to provide for their survivors in an ordinary fashion; it may be more difficult, for example, to obtain life insurance. Several members also believe that many individual victims can provide better for their future needs by controlling their own investment of a lump sum award, rather than receiving fixed periodic payments from an annuity purchased and administered by the insurer—which is sometimes proposed as an alternative to the lump sum method of payment.

3.3 Efficiency

The compensation system should operate in an economically efficient manner, delivering the maximum reparation possible from the funds available. The overall compensation fund should exist principally to provide compensation to victims. Any secondary expenses necessary to process compensation should be kept to a minimum.

The economic efficiency of the present compensation system can be judged in two respects: how much of the money awarded to individual victims do the victims actually receive, and how much of the insurance fund as a whole is directed to compensation.

3.3.1 INDIVIDUAL COMPENSATION AWARDS

Awards are substantially reduced by legal fees

Because legal fees are subtracted from an award, many victims (particularly those seriously injured) do not now receive the full extent of compensation they are awarded. The amount of each award is determined by calculating a victim's projected economic losses and other damages. It does not include any provision for paying legal fees, except for the small portion called party and party costs. To the extent that legal fees are subtracted from an award, a victim is denied the indemnity that a court or an adjuster determined the person would need. In short, some of the money intended for many victims never reaches them.

Fees may not be justified by the work performed

When liability is at issue (which is so only in a minority of cases), a lawyer operating on a contingency fee basis is gambling that the case will be successful—so the stakes of the potential win must be high enough. If the fees from such cases lost are not at least counterbalanced by the fees from successful cases, a lawyer might not remain in business.

In any case, however, contingency fees may or may not reflect the actual work involved in a particular case. Although it is possible to base the percentage fee on an estimate of the work likely to be involved, there is no intrinsic

relationship between the fee and the work performed.

In addition, there are a small number of lawyers who—having particular skill in automobile accident cases or a notoriety for such cases—charge a much higher than average rate. Although most lawyers charge a contingency fee of from 20 to 35 percent, a few charge as much as 45 percent. While a contingency fee in the lower end, say 25 percent, may be inadequate in a long, difficult case, it would be totally inappropriate in a major injury case where there is no real dispute about liability and the amount to be recovered is virtually predetermined. Take, for example, a case where liability is not in question and the compensation warranted is $1 million, but the policy limit of the at-fault driver is only $500,000. There should be relatively little work for the victim's lawyer to do, so a contingency fee is simply not justified.

Victims may not anticipate the impact of fees

Some victims may be in a distressed state of mind and may not clearly realize the significance of the fact that, once they have signed a contingency fee agreement, a large amount will be deducted from the money they may ultimately be awarded and would need for their future support. A victim may not realize the full significance of this until the moment he or she discovers that the cheque received, which has been processed through the lawyer, is not for the award granted in court, but up to a third or more less.

When lawyers charge an unconscionably high percentage, contingency fees are a particularly acute problem. But even in cases with relatively fair fee arrangements, victims still lose a significant portion of the compensation judged necessary for their livelihood. In light of this fact alone, the compensation system is not working efficiently.

The extent of the problem is difficult to measure

The committee believes that only a few lawyers involved in accident cases are charging a vastly greater percentage than they are entitled to according to the work they have performed. Nevertheless, there are many cases where perhaps a

contingency based fee should not be used at all, but rather, an hourly based fee plus expenses. It is difficult, however, to measure the extent of these problems or the effect of contingency fees in general. Because fee arrangements are a private affair between lawyers and clients, and because an agreed percentage plays no role in legal proceedings and is not normally a matter of public record, there is no information about the total impact legal costs have on awards.

Many victims may be unaware fees can be challenged

There are two ways clients can challenge contingency fees: through the Supreme Court of British Columbia or through a taxing officer of the Supreme Court.

Guidelines put out by the Benchers of the Law Society of British Columbia in the Professional Conduct Handbook require that contingency fee agreements between clients and their lawyers must be in writing. Under the Barristers and Solictors Act, written contracts are subject to review by a Supreme Court judge. A client desiring such a review must present an application for it within a certain time limit. Upon review, the court can rule that the contract be revised or cancelled completely, and then tax the bill as if no contract had been made.

Clients are also entitled to challenge contingency fees through a less formal method called taxing. To do this, clients must make an application for an appointment with a district registrar or other taxing officer of the Supreme Court to tax the bill they have received. The officer is empowered to review a lawyer's work records, determine whether in the circumstances a particular fee is fair, and order that it be modified.

From the evidence of the number and nature of fees challenged, one might conclude that abuse of contingency fees is not widespread; but on the other hand, many clients may be disinclined to ever challenge their fees. Some may not be fully aware of the right to do so, although it is required that this right be stated on all contingency fee contracts. Furthermore, even if they are disturbed by the fee ultimately subtracted from their award, some people may believe that they

must abide by an agreement they previously signed. They may also feel as reluctant to challenge their lawyer as they would be, for example, to challenge their doctor.

MINORITY VIEWS

Two members of the committee believe that, although there are a few cases where unreasonably high percentages have been charged, there is too little abuse of the system to consider contingency fees a problem per se. One of these two members feels, however, that many cases go to court unnecessarily and that the legal costs for these cases are a loss to the compensation fund. The other member believes that the costs of the adversary system are proper and necessary for determining fair compensation awards, and that it is simply a fact of life that victims must pay these costs in order to get reparation. Furthermore, he contends, victims usually obtain more compensation with the aid of a lawyer, even after fees are deducted, than they would get by dealing with an adjuster on their own. (Additional arguments for and against contingency fees are included in section 5.3.3.)

3.3.2 THE INSURANCE FUND

Legal costs reduce overall compensation

Even if legal fees were not subtracted from awards, but were considered an additional item of loss to be provided for in each settlement, they would still deplete the total fund available for compensation. While individual victims would no longer lose a portion of their own award, legal fees would nevertheless come out of the total pool of insurance money available through Autoplan, leaving less for all victims. In short, legal costs reduce the overall compensation fund.

The adversary system generates unnecessary costs

The question then becomes: is all this legal activity necessary to provide just compensation? The committee believes that, in the vast majority of cases, no legal action is necessary to determine the fair amount of compensation due for economic losses. Liability is usually not in question, although it may become the focus of some cases since even a small

percentage shift in comparative negligence might mean a significant amount of money lost or gained.

More often, the main debate revolves around the assessment of a victim's injury and the amount of compensation needed. The lump sum system of awards requires that the damages be assessed once and for all—and the amount is final. As a consequence, much time is spent estimating a victim's damages as accurately as possible, and then projecting these losses into the future. As stated previously, accuracy in these matters is impossible to achieve. Many resources are therefore wasted in the exercise.

The fault system invariably encourages an adversarial relationship between plaintiffs and defendants; that is, between victims represented by their lawyer and wrongdoers represented by the insurance corporation. The larger a potential settlement, the longer and harder the parties are willing to fight for the chance of winning more or losing less. Adversarial proceedings create additional costs in the proceedings leading to settlement. Sometimes called frictional costs, these include (in addition to legal fees) investigation charges, extra medical testimony, court fees, fees for "expert" witnesses, and so on. To the extent that these costs are only necessary because of the adversarial relationship, and are not necessary to determine fair compensation, they are a drain on the overall fund available to help victims.

Many small general damage awards deplete the fund

There is another area that represents a significant draw on the compensation fund—awards for non-economic losses. These cover compensation for those things not clearly measurable in terms of money, primarily pain and suffering, and the loss of amenities, such as the ability to play a favorite sport. Non-economic losses are customarily awarded in addition to compensation for strictly economic losses, such as lost income and the cost of care and rehabilitation.

The committee believes that economic losses should have the highest priority for compensation, but that non-economic losses are also appropriate for serious injuries. Therefore, we do not say that all awards for non-economic losses

take money out of the compensation fund which on principle ought to provide only for economic losses.

Instead, we believe the problem lies in the large number of relatively small, possibly unjustified pain and suffering awards given to claimants in order to settle their cases quickly. It is quite common for an adjuster to pay the victim of a minor injury (in addition to, or even without, any payment for lost wages and medical treatment) a sum of from $500 up to several thousand dollars for pain and suffering. In this way, victims of minor or insignificant injury feel they have received something for their intangible loss or inconvenience. Meanwhile, the adjusters involved know that by offering a sum for pain and suffering they can close cases successfully and eliminate additional claims or more expensive, lengthy negotiation or litigation.

In effect, it appears worthwhile to "pay off" some victims to reduce the number of active, time-consuming cases. And under the present system, the pay off may indeed be worthwhile from a strictly financial viewpoint. The problem, though, is that all of these seemingly small pain and suffering awards, together with all the costs of processing them, represent a large depletion of the total fund.

The vast majority of third party liability claims related to injury are relatively small. In 1980, for example, approximately 70 percent of the claims, accounting for about 10 percent of the total dollars paid out, were for amounts less than $5000 (see table 3.9). We do not mean to suggest that all of these claims, and others like them, are unjustified. Some no doubt deserve compensation. But their large number suggests that the practice of paying off small claims is pervasive. As a result of this practice, money is lost that could otherwise be allocated to meet the needs of more seriously injured victims.

It is important to note that the problem of exaggerated pain and suffering awards is not unique to a large insurance monopoly like ICBC, but is common throughout the automobile insurance industry.

Are these smaller awards for non-economic losses justified, and, if so, to what extent? One way to judge them

is to compare larger awards to smaller ones. Because of the Supreme Court of Canada's so-called Trilogy decisions, there is now legal precedent that awards for non-economic losses, except those granted in very exceptional cases, should have a rough upper limit (in the extreme case, for example, of a young person rendered quadriplegic) of $100,000 in 1978 constant dollars. Considering that such victims might receive this sum for their entire pain and suffering and loss of amenities, it seems unfair that someone with only a minor back strain or a whip lash (as unpleasant as these injuries are) may receive several thousand dollars. When compared to the upper limit for catastrophically injured victims, the non-economic losses awarded for most minor injuries should be far lower than they currently are.

TABLE 3.9

Distribution of Third-Party Bodily Injury Claims By Size of Claim

British Columbia, 1980

Size of Claim	Percent of Total Number of Claims	Percent of Total Dollar Value
$	%	%
0 to 500	30.3	0.4
500 to 1,000	13.2	1.1
1,000 to 5,000	27.3	7.5
5,000 to 10,000	13.3	11.0
10,000 to 50,000	13.3	32.7
50,000 to 100,000	1.5	13.3
100,000 and over	1.1	34.0
Total	100.0	100.0

Source: *ICBC internal data.*

Any attempt to redress this unfair balance may be doomed to failure, since a natural outcome of the fault system is a tendency by adjusters to avoid the costs of further adversary action by closing files quickly with offers of money for pain and suffering. The effect of this on the overall system is a significant depletion of the compensation funds that could otherwise provide for more important needs.

MINORITY VIEWS

One committee member believes that the costs of the adversary system are not a wasted expenditure, but are absolutely necessary in the process of determining both a victim's injury and the compensation due for economic losses. He also argues that compensation for non-economic losses, including all the smaller awards, does not represent an unjustifiable depletion of the overall insurance fund because, he believes, fully compensating this area of loss is just as important as compensating economic losses.

3.3.3 AFFORDABILITY OF INSURANCE

Although examining the cost of insurance is not part of this committee's mandate per se, there is a direct relationship between insurance rates and the compensation system: the indemnity fund is made up out of all the premiums paid, plus the interest gained from their investment. It would be tempting, though unpopular, to conclude that premiums should simply be increased to provide a larger fund for more generous compensation. Some increases for this purpose may, indeed, not only be justified, but may even be publically acceptable, as long as people recognize that they are paying what is necessary for the product they desire.

Nevertheless, the committee recognizes that insurance rates must be kept at an affordable level. Since people need to drive, unaffordable rates would create unfair hardship or tempt some people to drive illegally without insurance.

To maintain affordable rates and provide more generous compensation at the same time poses a fundamental challenge: to improve the system's efficiency by getting more compensation out of the existing fund without substantially increasing insurance costs. We believe this challenge can be realistically met; and indeed, part of our mandate is to recommend improvements in the compensation system that require no substantially greater cost to the motoring public.

3.4 Equity

Money from the compensation fund should be allocated to victims on an equitable basis so that the amount they receive corresponds proportionately to their needs. All victims should have their economic needs taken care of, but some advantage should be accorded to innocent victims in regard to non-economic losses.

The present compensation system operates somewhat like a lottery. The amount of reparation victims receive often depends on factors that have nothing to do with their injury. Of two victims with the same injury, one may receive compensation adequate for a lifetime, while another ends up on social assistance.

Who injures a victim (that is, how much coverage the wrongdoer has) is often more important in determining how much compensation the victim receives than how badly the person is hurt. If the other party is clearly at fault and has enough liability coverage, the victim may receive adequate reparation. If the wrongdoer, however, does not have enough coverage, it is the victim's misfortune—and particularly so if he or she is seriously hurt.

On the other hand, if the victim also happens to be the wrongdoer and is seriously hurt, his or her misfortune is even worse—even if the person's wrongdoing was the result of committing only a minor incident of negligence, being momentarily inattentive, or simply being in the wrong place at the wrong time.

The first part of this section examines the fairness of awards to innocent victims, and the second part reviews the plight of wrongdoers.

3.4.1 UNFAIRNESS OF AWARDS

Individual liability limits produce inequitable awards

Of the many outside factors that affect the size of a compensation award, the most clearly limiting is the limit of third-party liability coverage carried by the particular wrongdoer. After lengthy deliberation and testimony, the court determines an award based on need, without regard to

the availability of funds to cover that need. If a defendant's liability coverage is less than an award, the innocent victim has little hope of getting the rest from the wrongdoer's personal assets.

A similar situation arises in hit-and-run accidents, where liability in any single case is limited by the Regulations of the Insurance (Motor Vehicle) Act to $100,000—hardly enough for catastrophic injuries. The innocent victims even in hit-and-run cases are required to take tort action if they do not accept a settlement offered by the insurance corporation. Is it fair that an innocent victim who becomes a quadriplegic receives a maximum of only $100,000 because the wrongdoer escaped, while another victim with a similarly catastrophic injury receives, say, $750,000 because the wrongdoer remained at the scene and carried that much insurance? Inequities such as this example do not arise because the justice system is itself unfair, but because compensation in the fault system is based on an individual wrongdoer's ability to provide it.

Inequities result from the adversarial process

Besides liability limits, there are other, more subjective factors that can seriously affect the fairness of awards. There can only be as much fairness as the present system allows, and many subtle forces come into play when cases go to court. In terms of generosity, there are conservative judges and liberal judges, and there are sympathetic juries and not so sympathetic juries. There are also skillful and less skillful lawyers, expressive and inexpressive clients, and witnesses with good and bad memories. Investigative reports can be carelessly or well prepared, and one victim may have excellent expert testimony, while another's may be undistinguished. All of these facets can significantly influence the final outcome of a tort action, even when liability is not in question. Awards for similar injuries vary immensely because adversarial situations vary immensely.

To conclude that the adversary system itself is to blame would be missing the point. Much of society's justice is built on the interpretive wisdom of judges and the competitive

interaction of adversarial parties—and so it should be. But are adversarial proceedings purposeful when the determination of compensation consists only of calculating tangible losses, not judging between degrees of right and wrong? It should be clear that we are not criticizing judges or the court system itself; most judges do as well as can be expected under the difficult circumstances of accident cases. It is simply inevitable that legal technicalities and variable court proceedings within the present system create unequal awards for similar losses.

The most seriously injured face greater obstacles

In reviewing the efficiency of the present compensation system, it was pointed out earlier in the report that much money is wasted because there is a natural tendency to give unnecessarily generous pain and suffering awards for the large number of relatively small injuries in order to close cases expeditiously. For the system at large, this overcompensation of minor injuries unduly depletes the overall fund.

At the same time that people with only minor injuries are overcompensated for their pain and suffering, studies conducted some years ago in Canada and the United States showed that there was a clear tendency to undercompensate the economic losses of gravely injured victims.

While the committee believes that lesser injuries generally continue to be overcompensated, we believe that there is now a trend toward more adequate compensation for major injuries. Since the Supreme Court of Canada's Trilogy decisions, awards granted to seriously or catastrophically injured persons have tended to be far greater, in large part because the court called for more generous compensation and defined specific categories of damages for which awards had to provide. The institution of pre-judgement interest has also been a major factor in increasing the amount of money awarded in severe injury cases, since these cases often take several years to settle. As long as the at-fault driver has a sufficient liability limit, seriously injured victims have a greater likelihood today of recovering equitable compensation for their economic losses.

Nevertheless, victims of major injury still have to overcome many more obstacles in their attempt to recover compensation than do victims of minor injury. Understandably, because the stakes for the insurance company are so much greater, the facts involved in more serious cases are much more intensely and carefully scrutinized by adjusters and investigators. For a large claim, it is customary that all the circumstances are very closely examined. A $1000 claim, however, is not worth the cost and trouble of intense examination. In addition, while the effects of a catastrophic injury are clearly obvious, it may be fairly easy for a victim to exaggerate the effects of a minor injury. The smaller a potential award, the greater the chances are of a claimant winning an exaggerated or even dishonest claim.

It is also commonly accepted among those in the claims field that claimants who are more persistent or more obstinate tend to get relatively more compensation than victims who are less difficult. Again, this is a natural result of the essentially adversarial relationship between victims and an insurance company—which exists whether the company is a government monopoly or a private insurer. It is common throughout the insurance industry to try to close files as expeditiously as possible. Therefore, more aggressive claimants are more likely to get paid off more generously because they represent a potentially greater loss of working time or a greater threat of costly litigation. It is not fair that victims who are more cooperative, or perhaps simply less unpleasant, should receive less reparation. This effect can be particularly cruel to those victims of serious injury who are more compliant simply because of the severity of their situation.

So even though seriously injured victims now have a greater chance of obtaining more equitable compensation for their economic losses, the difficult experiences they have to go through to get it are far from equitable. A victim who suffers some hurt and inconvenience may be promptly awarded far more than is warranted, while a victim whose whole life is completely ruined may have to wait several years to receive desperately needed compensation, and may have to fight hard for every bit of it.

MINORITY VIEWS

Several committee members believe that although there are occasionally inequitable awards, they are not a serious problem because the justice system does as good a job with tort cases as with any others. They feel our form of justice is the most desirable even though it is imperfect, and therefore, produces occasional inequities. They believe that the advantage of the adversary system is that it determines losses, particularly non-economic ones, on an individualized basis. It is thus, they argue, a more personalized method than, for example, the commonly proposed alternative of using a predetermined scale based on generic types of injuries.

One of these committee members believes, furthermore, that the adversary system is also a very acceptable and fair environment for adjudicating economic losses. He disagrees that inequities are naturally produced out of the complexity of the tort system. Instead, he says, it is the varying nature of individual injuries which quite properly creates discrepancies between awards. He also believes that any inequity between awards produced by varying limits on individual liability coverage is no more unjust than the inequity resulting from any other limits, such as the $100,000 ceiling on Part VII care and rehabilitation benefits.

3.4.2 THE WRONGDOER'S PLIGHT

As pointed out earlier in this report, most uninjured wrongdoers are only punished in the present tort system of compensation by increased insurance premiums, since insurance usually covers the cost of accidents. Injured wrongdoers, however, can be severely punished because they are ineligible for any compensation other than limited no-fault benefits.

It is easy to be technically at fault

In many situations, becoming the wrongdoer in an accident is another instance of how the present compensation system acts somewhat like a lottery. All drivers are negligent from time to time. One study (see Section 4.1.1) showed

that the average driver is negligent as often as once every two minutes. Causing an accident on one of these many occasions can simply be a matter of being in the wrong place at the wrong time.

This is not to suggest that negligent driving should be accepted as normal behaviour, particularly in clear cases of negligence, such as ignoring a stop sign or traffic light. Nevertheless, it is a fact of life that no one is perfect, even as much as one might want to be, and carelessness is sometimes inevitable in the complex activity of driving. Weather conditions vary, traffic volumes and patterns change, and people's driving skills are highly variable. There are wrongdoers in accidents who are thoroughly reprehensible, such as drunk drivers; but there are others whose actions might be described more fairly as mistakes or errors of judgement. Furthermore, it is often difficult, and sometimes impossible, to attribute an accident to any single cause.

In the event of criminal proceedings against a driver, the justice system may discriminate between qualitative degrees of negligence. In tort proceedings, there is no such discrimination. The primary source of indemnity, liability insurance, is totally withheld from an at-fault driver, or proportionately withheld to the extent that each party in an accident is determined to have been at fault. A driver who, by inattention or a minor miscalculation, causes an accident and is rendered quadriplegic receives as little compensation as a drunk driver who wanders into the opposing line of traffic and ends up in the same condition. Under the present fault system, there is simply no distinction between types of negligence.

Nor is there fairness for drivers who are technically at fault in one-car accidents. If, for example, a motorist drives over black ice and skids into a telephone pole, he or she is ineligible to receive any compensation other than no-fault benefits. It does not matter if it has been freezing for a number of days and the driver should know there is black ice, or if it froze over an hour before—the driver is technically at fault and thus ineligible for adequate compensation. In contrast, take the case of two drunken people out for a joyride. The passenger, though in some ways as negligent as the driver, if

injured in an accident can sue the driver and possibly receive full reparation.

How should wrongdoers be punished?

While one can see that the present system is unfair for injured motorists who are only slightly at fault, it is more difficult to judge fairness when considering the plight of truly negligent wrongdoers. One's natural instincts may be to conclude that such persons deserve what they get—or insofar as compensation goes, what they do not get. It seems only just that they should not gain from their bad actions. Yet, on closer examination, the situation is not so simple. To begin with, no victim really profits from compensation. Compensation is not awarded like a prize, but is provided solely to help victims regain, as much as possible, their position prior to an accident. A victim, whether innocent or guilty, should not, strictly speaking, gain anything at all from compensation.

The other thing that must be considered is that an injured wrongdoer, particularly a seriously injured one, may well have to be compensated by society anyway, through the welfare system. In reality then, the question is whether impoverished wrongdoers should be left to become wards of society at large, or should be compensated under a system designed to deal with all automobile accident victims.

A wrongdoer's innocent family suffers unfairly

Perhaps an even more serious situation is the predicament of a wrongdoer's family. If it is assumed that they are innocent in a case, why should they suffer because of their family member's negligence or error of judgement? If a wrongdoer is the head of a family, and he or she is injured and cannot receive adequate compensation, the entire family suffers economic deprivation.

Furthermore, if family members are injured themselves, their recourse to compensation may be limited. Under the Married Woman's Property Act, a husband or wife may not take tort action for damages against his or her spouse. Similarly, under third-party liability coverage, the corporation

does not indemnify insureds against damages resulting from any injury they might cause to their spouse. This provision excludes any compensation other than limited no-fault benefits. Children of a wrongdoer, however, can sue their parent and recover compensation through liability coverage.

The plight of the wrongdoer is not really a simple question of right or wrong, but a complex social and human problem. Is it right to deprive accident victims (and especially their innocent family members) of compensation because the system demands that someone be found at fault in every case, even in those where an alleged wrongdoer may actually have had very little or no control? The committee believes that under the present system it is sometimes too easy to be judged a wrongdoer and thus be denied adequate compensation.

MINORITY VIEWS

One member of the committee believes that wrongdoers are already fairly compensated through Part VII benefits, and that it is just that they not receive additional compensation from the insurance fund. He believes people should be held responsible for their actions and suffer accordingly when they have been found negligent. This member also discounts the problem of drivers who cause accidents through momentary inattention. This kind of case, he contends, rarely leads to a serious type of accident where either the innocent or the wrongdoer is gravely injured. Serious injuries, he argues, are more often the result of gross negligence, often committed by young, irresponsible, speeding or drinking drivers.

He also believes that the inequities resulting from single-car accidents where no one is really to blame are no different from any other kind of similar misfortune, such as household accidents. He points out that, although these events are unfortunate, legal tradition does not provide a form of redress for such self-inflicted accidents. The same committee member believes that the plight of the wrongdoer's family is not a problem for society to solve. He feels family members should be responsible to one another for their own actions, without the involvement of the insurance system.

Several other committee members, although they believe wrongdoers should have adequate indemnity for economic losses to the extent that they will not become wards of society at large, do not want compensation for wrongdoers to reduce the amount of compensation available for the innocent. Furthermore, as discussed later, nearly all the committee members agree that only innocent victims should be able to win compensation for non-economic losses (that is, damages for pain and suffering or for loss of amenities).

3.5 Compassion

Accident victims should receive humane, caring treatment in whatever ways they come in contact with the compensation system. The system should provide assistance without subjecting persons already injured to any undue, unpleasant experiences.

This section examines how humanely the victims of traffic accidents are treated in the process of obtaining their compensation. The occasions when compassion is often most seriously lacking are when victims deal with the insurance bureaucracy and when they confront the adversarial legal situation.

3.5.1 PROBLEMS OF BUREAUCRACY

Dealing with a large bureaucracy can be difficult for anyone, especially for persons who have just gone through the trauma of an accident. Their pain and suffering can be compounded by the interviews, questions, and forms they must contend with, as well as the uncertainties and delays they must face. It is often an unpleasant process. But how much of this in British Columbia is the result of there being one large government-operated insurance corporation and how much is it inherent in the compensation process itself?

The injured victim of a traffic accident is already in a difficult, if not painful, position. The process of obtaining compensation can easily add to this difficulty. The person's position is worse, but otherwise not very different in nature, from that of someone making any kind of an insurance claim. Many people who take a claim to an insurance company start out in the distressed state of mind of having lost something of value. For this reason, the claiming process is always stressful. Furthermore, because insurance companies continually deal with people who are in this stressful state, it is not surprising that adjusters and other claims people sometimes become hardened by the process and often lose patience with claimants. Adjusters cope with many cases every day, while for victims, theirs is the only case.

In addition, most victims do not like being told by bureaucrats what the limits of their injuries are and what

dollar value their injuries hold in terms of economic loss or pain and suffering. Most people are only used to dealing with sympathetic doctors when it comes to injury, and may be distressed by the more pecuniary attitude of some insurance officials.

It might be argued that a large corporation like ICBC is more impersonal in its dealings than is a smaller, private insurance company. On the other hand, it can also be argued that because ICBC is a public agency its mandate carries with it a greater sense of public responsibility.

Nevertheless, as with any large bureaucracy, the volume of cases, paperwork, and layers of administration at ICBC may generate a tendency within the corporation to treat people with neither enough compassion nor individual care. ICBC has taken steps to deal with this problem through training and employee communications; but it is an ongoing problem, one which all bureaucracies must attempt to alleviate on a continuing basis.

Furthermore, even though ICBC does not operate to produce a profit for shareholders, some claims officials still tend to hold back compensation. This is not meant to say that adjusters are heartless people, but that the very nature of liability insurance creates adversarial conflicts, with suspicion and mistrust on the part of both victim and insurer.

MINORITY VIEWS

Committee members have several different opinions as to how serious the bureaucratic problems are at ICBC. Some feel the corporation deals with victims more compassionately than was previously the case with private insurers; others feel much more improvement is still needed. Several members of the committee believe that bureaucratic problems are inevitable under any system, fault or no-fault, and that they are particularly acute at ICBC because it is a large government monopoly. One member, drawing parallels to Workers' Compensation and the current administration of Autoplan's Part VII benefits, thinks the bureaucracy would be even worse under a no-fault system, where, he feels, there would be at least as much of an adversarial relationship

between victim and insurer as there is now under the fault system.

3.5.2 THE LEGAL PROCESS

Once an accident victim's case enters the legal arena, the adversarial relationship is intensified and the system becomes even less compassionate. To begin with, the victim discovers that as soon as a lawyer has been hired to handle the case, the corporation will no longer deal with the victim directly, but only through the lawyer, as is the customary practice in both the insurance industry and the legal profession.

Many lawyers do not adequately prepare their clients for the ensuing process. The victim is understandably concerned and anxious, and this is now compounded by the inevitable delays created by the legal system. These delays and uncertainties weigh very heavily on victims.

As their cases near trial, victims receive the harshest treatment yet. Probably not until this point do they fully realize that, even though they are the victim, the forces of a large and powerful insurance company are now directed against them. During the examination for discovery and the trial itself, the objective of the defence (undertaken by the insurance company) is to contain the case of the plaintiff—particularly if the amount in question is large. Furthermore, the company is not just concerned with the outcome of a single specific case, but also with how that case may set a precedent for future cases.

Under the adversary system, the insurance company is forced into the position of trying to deny victims as much compensation as possible by attacking their very innocence and denying their needs. Victims suddenly feel as if they are the wrongdoer, rather than the innocent party. It is a viciously cruel process; and many victims, when they experience its full brutality in an examination for discovery—even after all the delays they may have endured—then want to settle as quickly as possible. Unfortunately, this inherent cruelty of the process plays directly into the hands of the defence, becoming a convenient tool to settle claims more quickly and to the corporation's advantage.

This picture makes the principal players—the corporation and the victims' lawyers—seem cruel and self-serving. But that is not the case. It is not the players who lack compassion, it is the system itself. The confrontations, delays, uncertainties, and cross-examinations are all normal events because the fault system does not pay compensation purely on the basis of a victim's needs, but in large part on the basis of the victim's ability to establish a proof of damage.

This situation is present anywhere insurance comes under the fault system, whether it is provided through private companies or, as in British Columbia, through a government operation. The one serious, additional complication here in B.C. is that when victims go to court they find not just a large insurance company opposing them, but their very own insurance company. The difficulty and anxiety of fighting a large, legally sophisticated insurance company is compounded by the extreme displeasure of discovering that it is one's very own company—and a government agency as well—that is defending the wrongdoer. In short, many innocent victims feel completely betrayed.

Is the betrayal, though, really ICBC's? Or is it the system's—a system designed to determine fault, not to provide compensation?

MINORITY VIEWS

One committee member, although he agrees that the adversarial situation is stressful for many victims, believes that it is a necessary component of the fault system. Although people are offended by the impersonal bartering and negotiations that occur, this member considers these indignities to be a lesser evil than what he pictures as the alternative: replacing the fault system with a no-fault compensation scheme administered by a faceless, insensitive bureaucracy. Another committee member believes both types of institutions are equally pernicious. Several members also believe that the betrayal some victims feel in the legal process is particularly acute primarily because ICBC, in its monopoly position, is always the power opposing victims.

3.6 Intelligibility

The compensation system should be simple and straightforward so that it is understood, in theory, by the general public and, in practice, by claimants. Furthermore, the procedures should be clear enough that they do not confuse or mislead accident victims, who already have enough to contend with.

The committee has found to its surprise that public misunderstanding of the compensation system is a much more serious and widespread problem than we anticipated. Most of us on the committee are involved directly or indirectly in the automobile insurance field, and perhaps it was natural for us to assume that people are as familiar with insurance as we are. They definitely are not. People do not seem to take the time to learn about something they feel will probably never affect them, especially if it is something unpleasant like having an accident. Then, when an accident actually happens, the lack of prior understanding is compounded by the confusion of having to deal immediately with a highly complex series of situations, while in a highly anxious state of misfortune.

3.6.1 MISUNDERSTANDINGS ABOUT INSURANCE

Complexity exacerbates the problem

Although people may never adequately understand automobile insurance until they have the unfortunate experience of having to contend with it directly, the complexity of the system exacerbates this problem because the little that people think they understand is usually wrong. The public at large does not comprehend the present compensation system in theory, and when they must deal with it in actuality as victims, they are completely at a loss.

The cause of the problem, however, is not just that the public is unwilling to understand the system, but that the system is not easily capable of being understood.

Property insurance is easier to comprehend

Because motorists have more experience dealing with property damage claims, most seem to understand that when they are at fault in an accident, the costs of property damage to all the cars involved will be charged against their policy, and as a result, their premiums will go up. They may be surprised and angry about being found technically at fault if they thought they were innocent, but even in this regard, they seem to understand and accept the basic concept of liability.

People think their own insurance covers them

This understanding of liability for property damage, however, does not seem to carry over to the concept of being an accident victim. Individuals seem to have the impression that, since they are insured, they are fully covered when injured. Of course, to a limited extent, that is true. The compulsory Autoplan coverage includes limited no-fault benefits. To the extent that people are aware of these no-fault benefits, they may assume that they are adequately covered on a first-party basis. What they apparently do not know is that the purpose of the present no-fault benefits is not to provide complete compensation, but to provide some minimal interim relief pending the resolution of liability coverage. So there is misunderstanding here about both fault and no-fault coverage, probably because the two seem to contradict each other.

The public assumes victims are protected

In the past quarter century, automobile insurance has undergone more fundamental changes than any other kind of insurance coverage. In British Columbia, it has been made (with very few exceptions) universally mandatory; some no-fault benefits have been added; Autoplan was introduced; and age, sex, and marital status were eliminated as rating factors. These modifications have been government responses to concerns arising, in part, out of the proliferating number of vehicles, accidents, damage costs, and human losses.

Although the public has found it difficult to keep technically abreast of all these changes, the main thrust of the changes reflects a growing attitude that the interests of accident victims should be paramount. Automobile insurance was made universally compulsory primarily to provide better protection for victims. The public now expects that automobile insurance is there to protect them if they get into trouble. But when individuals actually get into trouble, they realize that the compensation system is not as protective as they thought.

3.6.2 MISUNDERSTANDINGS ABOUT ICBC

ICBC expected to act on the victim's behalf

The insurance corporation can easily become the culprit in the mind of a victim. After all, here is this big government agency supposedly set up to help victims; and then individual victims find that it is not only difficult to get help, but even worse, that ICBC is their opponent when they go to court. Because ICBC is a public agency, there is widespread belief that it is a kind of social agency; whereas, in fact, it is an insurance company and usually acts just like an insurance company would be expected to act.

In some respects, the fault system and universal compulsory insurance under a monopoly may seem incompatible. Even though a single company insures everyone, the fault system requires that victims, often policyholders themselves, must hire their own lawyers and sue an alleged wrongdoer. Meanwhile, wrongdoers, also policyholders, are represented by the victims' own insurance company—the only insurance company. ICBC provides victims with their own liability and no-fault insurance, but like any other insurance company, also acts on behalf of wrongdoers.

This apparent contradiction is not only appalling and confusing to victims, but it seems to be a fundamental contradiction of what they (and the public at large) have come to expect of the automobile insurance system. The present system is basically unintelligible to the public because it does not provide what the public essentially expects that it should.

MINORITY VIEWS

One member of the committee believes that the system is not basically unintelligible. Any confusion that exists could be solved, he maintains, simply by lawyers better preparing their clients for the difficulties they are likely to encounter, and by ICBC better explaining its dual role as both first-party and third-party insurer. This committee member also believes that this dual role is, in fact, the principal cause of public confusion about insurance coverage. It is not the nature of liability that is confusing, he believes, but ICBC's inherent conflict of interest as a monolopy insurer providing victims with first-party benefits while also opposing them when it comes to a third-party claim.

3.7 Public Attitudes

Shortly after the committee was established, we employed a consulting firm to carry out a series of surveys to help us understand what British Columbians think about various compensation issues. The results of these surveys influenced us more than we expected. In particular, the real-life stories told by a number of very seriously injured victims reinforced our feeling that, while examining problems and potential solutions from a technical perspective, we must never lose sight of the human dimension.

The consultant's summaries of the surveys are included in Appendix A. Our intent in this section is not to reproduce the information in those summaries, but to explain our interpretation of the results.

3.7.1 SURVEY OBJECTIVES AND METHODOLOGY

The surveys had two principal objectives: to learn about the general public's attitudes and to learn about the experiences of seriously injured victims.

To accomplish the first purpose, two surveys were conducted: "Phases One and Two, Public Attitudes Towards Compensation for Bodily Injuries Incurred in Automobile Accidents." Phase One attempted to develop some basic hypotheses about public opinion by surveying people who had had some direct experience with the system. It consisted of 24 in-depth interviews with a cross-section of people who had recently settled bodily injury claims, plus 12 interviews with family members of similar claimants.

The results of the first survey were used in Phase Two to carry out a much broader, statistical study of attitudes held by the public at large. To accomplish this, the consultants conducted 501 personal interviews with adults over the age of 18. Since this sample was designed to represent the entire public of British Columbia, it included residents from several parts of the province; previous injury experience was not a qualification.

The final survey—"Recipients' Attitudes Towards Large Lump Sum Settlements Awarded After Automobile Accidents"—was quite different in both its purpose and design. It comprised 17 in-depth interviews with accident victims who had received settlements over $100,000. The purpose here was to assess how successfully the victims managed these funds and what their attitudes would be to the idea of receiving large settlements in the form of periodic instalment payments rather than, as had actually occurred, in a single lump sum. Interview subjects were also asked if they thought their settlement was adequate and how they felt about the claiming process, their legal representation, and ICBC.

For all the surveys, the identity of the interview subjects is strictly confidential.

3.7.2 INTERPRETATION OF RESULTS

We believe that, given our knowledge of the compensation system, we have a responsibility to interpret the results of these surveys in the context of that knowledge. The public may perceive certain problems and prefer certain solutions, but policymakers must determine the real causes of these problems and evaluate the legal, political, and economic feasibility of potential solutions. Thus, while public policy should respond to public opinion, reforms must evolve out of informed analysis.

In reviewing the three surveys together, we reached several key conclusions, which are summarized below.

The present compensation system is not understood

All of the survey's conclusions must be interpreted in light of the fact that much of what people say about the present compensation system is based on lack of understanding or misunderstanding.

Most people have many misconceptions about how compensation is provided to the victims of automobile accidents. Even people who have dealt with the system do not always understand what happens or why.

Fault is valued, but not the process involved

The public does not perceive the integral relationship between the fault system and the process for obtaining compensation. If this relationship were more widely understood, public opinion about the present system might be more favourable to more thorough reform.

The general public, including those who have had direct experience with the compensation system, tend to support the principle of fault. But those with actual experience deplore the process they have had to go through. They criticize the same aspects that we on the committee, and others before us, have identified as serious problems: delays, confusion, effects of legal costs, bureaucratic insensitivity, degradation of victims, and so on. What most people do not seem to realize is that these problems are largely a direct product of the fault system.

Several committee members feel that ICBC's monopoly position itself creates much of the dissatisfaction voiced by those who have experienced the process. The majority of the committee, however, while agreeing that this fact may exacerbate the situation, believe that the root cause is the essential nature of the system, not the bureaucratic nature of the corporation.

Economic security seen as compensation's purpose

The public, particularly those who have suffered injury in an automobile accident, consider the provision of economic security to be the paramount purpose of compensation. Victims of serious injury give this a much higher priority than they give compensation for pain and suffering or retribution against those who caused their injury.

Most of these victims also believe they can never really be compensated for their pain and suffering or for their loss of limbs, mobility, and enjoyment of life. But they are very concerned that their future economic security be assured and that they be taken care of if there is a recurrence of complications resulting from their injury or disablement. The public at large also give non-economic losses, such as pain and

suffering, a lower priority and feel that compensation for these losses should be determined by an independent panel rather than in the courts. They do not seem to understand that non-economic losses, by their very nature, require more adjudication than strictly economic losses.

Wrongdoers are not perceived as uniformly guilty

Most people do not realize that the fault system denies compensation to all victims found totally at fault in an accident no matter how minor or how serious their wrongful actions may have been.

Although most people believe that the so-called guilty should not receive as much compensation as the innocent, when their definition of guilt is more closely examined, it is clear that they distinguish between different classes of guilt. They feel that someone who is guilty of more serious misconduct—such as driving while intoxicated—should receive much harsher treatment than someone who commits only a minor driving error. The public also believe that the innocent families of wrongdoers should not suffer the consequences of compensation being denied.

There is no general evidence of squandering

We found no evidence that victims of serious injury squander the large compensation award they receive in a single lump sum payment. Although we did not conduct an in-depth economic analysis of how awards have actually been managed, the survey we sponsored showed that the victims interviewed did a better job of managing their compensation money than either we or the general public tend to expect.

Most people believe it would be better for seriously injured victims to receive periodic payments directly related to ongoing needs. It is interesting to note that the more seriously injured victims surveyed also tend to favour periodic instalments as a method for payment—but only for victims who cannot manage their own money. Most felt that they themselves were able to manage their award and were happy to have received it in one lump sum.

Although there was no general evidence of squandering by the victims interviewed, only three felt they were truly successful in their investment of funds from their award. Five admitted to losing in investments. The most common investment was the purchase of a home or the paying out of a mortgage.

Several committee members feel that even if a home purchase is a good investment, since it is not the only kind of security compensation is intended to provide, the award may have been improperly used. Nevertheless, most committee members feel that a home purchase was probably the best investment these victims could have made at the time, particularly considering that when an award does not fully compensate a person's future economic needs a home may well provide the best form of future security.

PART FOUR

Alternative Systems

Alternative Systems

Thus far we have examined the present system of compensating victims of automobile accidents in British Columbia. In this part we turn our attention to alternative systems commonly called "no-fault." The committee's mandate does not specifically call for a review of no-fault as it exists outside of British Columbia, but we believe we must look beyond our borders to what others are doing and saying in order to properly assess the present system and recommend improvements.

4.1 The Nature of No-Fault

4.1.1 THE NO-FAULT PRINCIPLE

The no-fault system is easily misunderstood because it is so fundamentally different from the tort liability system to which our society is accustomed. Even the words "no-fault" can be misleading because they suggest the absence of responsibility on the roadway. Under a no-fault system, however, drivers can still be convicted for breaking any laws, and the fault principle itself may still be applied for purposes of insurance rating and liability for property damage.

No-fault pertains to only one thing—compensation for bodily injury or death. Its central principle is that all persons injured in an automobile accident and the survivors of persons killed are entitled to compensation, regardless of who was to blame for causing the accident. The designation "no-fault" is a convenient shorthand expression of this system's essential feature: compensation without regard to fault.

Although many varieties of no-fault have been proposed and adopted around the world, its essential nature can be summarized as meeting the following criteria: legal liability is either partly or totally eliminated as a basis for providing accident compensation and is replaced by a system which covers all victims, whether technically innocent or not, and which sometimes includes uninsured drivers as well as the insured. The objective of this universal system is to provide all victims with adequate compensation for the losses they have suffered.

No-fault substitutes one right for another. The right to sue for compensation is replaced by the right to guaranteed compensation. Where no-fault has been adopted, society clearly views it as a just reform. It is a reform, however, that requires a very major change in law—the abridgement of the right to sue.

No-fault represents another concept of accidents

The primary motive for changing to a no-fault insurance system has been a growing concern for the plight of victims and dissatisfaction with the fault system's inability to meet their needs. But while the inclination to adopt no-fault may be strong, it may also present a significant moral and philosophical dilemma. The right to sue someone responsible for an accident—and, in theory if not in practice, to exact retribution—is deeply rooted in our culture.

No-fault represents a different point of view about responsibility for automobile accidents. According to this view, driving is inherently risky; that is why people have insurance. This risk is the result of many factors, particularly human error. Since accidents result more from chance than from true fault, they are statistically unavoidable. That is not to say that driving behaviour cannot be modified by better law enforcement and education, but that it is a statistical fact of life that accidents will occur because driving is a complicated activity. One might say that traffic accidents are as inevitably the outcome of driving as errors of syntax are the result of talking.

Under the fault principle, however, there is no basic

acceptance of human error being commonplace. Instead, it is assumed that accidents result from acts of negligence which are committed when someone behaves differently from the way in which a reasonable, prudent person would have acted in the same circumstances. Advocates of no-fault state that this theoretically reasonable person does not exist. In reality, even the most responsible citizens (who society would agree are all reasonable persons) frequently commit driving mistakes or have moments of inattention. In a World Health Association study conducted in Washington, D.C., it was found that the average driver—while making an average of 200 observations and 20 decisions every mile—commits one error every two miles. But average drivers, whether reasonable persons or not, go unpunished for these frequent errors unless, by chance, they get caught for a clear traffic violation or cause an accident.

There is much debate about what the real causes of accidents are and how these can be mitigated. In any case, the no-fault system simply does not address itself to causes or to determining fault, but solely to providing compensation.

4.1.2 ORIGIN AND DEVELOPMENT OF NO-FAULT

The no-fault concept of insurance was first applied in the area of workers' compensation. In the increasingly industrialized era after 1900, there was growing concern about workplace injuries. The cumbersome adversary system was proving inadequate to meet the needs of the victims of these injuries. A scheme for universal workers' compensation was seen as an acceptable way of resolving the problem. Under this new scheme, workplace injuries were taken out of the tort system so that accident victims could be cared for without the need for lengthy and costly court action. Workers' compensation is as much an accepted feature of our society now, despite any criticisms of its administration, as is the right to sue for other types of losses.

Automobile accidents, however, are somewhat different than workplace accidents. There is usually only one person

involved in a work accident, whereas there is more likelihood of another person being at fault in an automobile accident. Nevertheless, the purpose of no-fault workers' compensation is essentially the same as for no-fault automobile accident compensation.

Automobile accidents were perceived as a serious societal problem at least as early as 1912. In Norway at that time, and later in Sweden and Finland, the driving of automobiles was considered, along with other certain things, as an inherently dangerous activity. In the event of accidents, victims were automatically entitled to a certain amount of third-party compensation without having to prove fault, even though the negligence principle remained in effect. Though other continental European countries did not provide automatic compensation, most held that automobile driving was inherently dangerous and that the burden of proof was on the instigator of an accident to prove the lack of negligence, rather than on the victim to establish the right to compensation.

It is often said that the first Canadian no-fault automobile insurance was adopted in Saskatchewan in 1946. It provided all victims with small amounts of accident benefits, but it did not limit anyone's right to sue for damages. In effect, then, these no-fault benefits were supplementary to the basic fault system, and not a replacement for it. Some call this type of insurance "pseudo no-fault" since it only supplements liability insurance coverage without abridging tort or replacing it with an alternative system.

From the 1930s on, various individuals and public interest groups in North America began to develop and promote true no-fault automobile accident compensation plans based on the model of workers' compensation. These advocates of reform drew support from growing public awareness of automobile accidents and concern both for victims and for the increasing costs of insurance. A detailed proposal by two Americans, Robert E. Keeton and Jeffrey O'Connell, received widespread attention and eventually became the basis for legislation adopted in a number of U.S. states, the first being Massachusetts in 1971.

Meanwhile, support for a true no-fault system had also grown in Canada. In 1971 the province of Quebec established a Royal commission to investigate the whole automobile accident situation. Known as the Gauvin Commission (after its chairman, Jean-Louis Gauvin), it recommended in its 1974 report the complete abandonment of the fault principle (as it then existed in the Civil Code) and its replacement with a no-fault insurance system, legislated by the government, but, as in the United States, administered through private insurance companies. In December 1977, a newly-elected government—which had campaigned in support of the no-fault concept, but as a government-run plan—enacted the reform after a period of public consultation. Quebec's plan remains today as the only true no-fault automobile accident compensation system in Canada and the only total no-fault system in North America, although various government and industry committees in Canada have proposed similar legislation:

British Columbia: Report of the Royal Commission on Automobile Insurance (1968)

Saskatchewan: Sickness and Accident Insurance Committee (1976); Minister's Advisory Committee on Reparations for Motor Vehicle Accidents (Carter, 1977); Reparations for Motor Vehicle Accidents (S.G.I.O., 1976)

Manitoba: White Paper on Accident and Sickness Compensation in Manitoba (1977)

Ontario: Report of the Select Committee on Company Law, Second Report on Automobile Insurance (1978); Report of the Ontario Law Reform Commission on Motor Vehicle Accident Compensation (1973)

Nova Scotia: Report on Automobile Insurance (1973)

Insurance Bureau of Canada: Variplan (1974)

4.1.3 NO-FAULT IN BRITISH COLUMBIA

As mentioned earlier in this report, the Royal Commission known as the Wooton Commission (appointed by the provincial government in 1966), recommended that a

no-fault system be adopted in British Columbia. The commission concluded that the present tort system was not effective as a deterrent to the negligent behaviour of motorists; that withholding compensation is not a valid form of punishment; and that, therefore, tort law cannot be effectively employed in the area of motor vehicle accidents. The commission recommended that the responsibility to insure against losses should rest with all motorists. To do this, the Wooton Commission concluded that a no-fault system would best serve the public interest.

Although the principal outcome of the commission's report was the institution of its other major recommendation, mandatory automobile insurance, the government acknowledged the need for some no-fault protection and included limited no-fault benefits in the compulsory package. This coverage was a modified version of what was then available in Saskatchewan.

While the new B.C. regulations tacitly acknowledged the relationship between no-fault and tort by providing for the subtraction of no-fault benefits from subsequent tort settlements, tort remained completely unrestricted. Thus, it can be said that British Columbia has a system with limited no-fault benefits, but not a no-fault system.

4.1.4 COMPENSATION IN A NO-FAULT SYSTEM

As a general rule, compensation in a true no-fault system provides a significant degree of indemnity for the economic losses suffered by all victims, and provides neither more nor less of this compensation to victims based on the responsibility for causing an accident. The objectives of this type of system are to compensate all victims; to satisfy victims' needs efficiently; to compensate on the basis of consistent and objective standards; and, in assessing losses, to concentrate on lost income and actual expenses incurred.

Economic losses

No-fault compensation for economic losses is not paid in one lump sum but is provided as needed. As a result, care and rehabilitation of victims in a no-fault system is an

ongoing responsiblity. Under the present system, the responsibility usually ends with a tort settlement or award regardless of whether or not the award actually provides adequate care and rehabilitation in the future.

In some no-fault jurisdictions, indemnity for wage loss is restricted to a few years, and in others there is little or no limit on duration. In either case, one of several methods is usually employed to calculate the amount of wage loss indemnity for which a victim is eligible. One method is to use a flat weekly or monthly rate for everyone, although this approach tends to provide too little to those who lose comparatively more income and too much to those with smaller losses.

An alternative is to compensate for a certain proportion of gross or net earnings—that is, something less than 100 percent. It is reasoned that the reduction from 100 percent represents income tax and the expenses normally spent to earn income. This also ensures that the compensation received by victims for lost earnings is not taxable. Furthermore, it is thought that a limit on the percentage of wage indemnity can encourage rehabilitation and, when possible, an earlier return to work.

Most plans also have a ceiling on the total yearly or monthly amount of income replacement provided. The ceiling usually covers the incomes earned by a large percentage of the working population. Having such a ceiling, however, means that higher income earners cannot obtain the same indemnity they theoretically could obtain under tort, where the only actual limit is a defendant's ability to pay the damages awarded. Most no-fault jurisdictions have concluded that it is not right for lower income earners to pay higher insurance premiums so that the plan can cover the larger income losses of the wealthier members of society. These jurisdictions have decided that wealthier individuals can afford to pay for optional, supplementary insurance to protect their higher incomes.

In the case of a victim's death, no-fault plans customarily pay surviving dependants compensation for economic losses in the form of either a lump sum, a temporary pension, or

both. This compensation is designed solely to replace what dependants would have received from the deceased as support during their dependency.

Non-economic losses

There is considerable divergence among no-fault plans in how they deal with non-economic losses, like pain and suffering. Some jurisdictions have concluded that—since there is no way to accurately measure these kinds of losses—they should be compensated according to a pre-set schedule of payments for different injuries or degrees of disability.

Others have elected to retain tort as an option for victims to seek compensation for non-economic losses—either in their full amount or above a certain threshold. These thresholds apply only to non-economic losses and do not limit compensation for wage loss or care and rehabilitation.

The purpose of a threshold is to restrict access to the tort system for the recovery of non-economic losses to only the more serious injuries. In this way, the large number of smaller claims are eliminated in order to preserve the insurance funds needed to implement the no-fault system's more generous compensation for strictly economic losses.

Thresholds are commonly defined in one of three ways: by length of disability, by amount of economic loss, or by degree of injury. Jurisdictions where the threshold is defined by the amount of economic loss have found that there is an unavoidable incentive to exaggerate losses or prolong a disability in order to surmount the threshold and obtain the right to pursue legal action for additional compensation. A so-called verbal threshold—which is defined according to specific types or severities of injury or disability—has usually proved to be more effective, although courts may still be called on to set precedents defining a threshold's precise meaning or implication.

4.2 No-Fault in Other Jurisdictions

The committee chose to examine two no-fault plans in particular detail, those of Quebec and the state of Michigan. The reason for selecting Quebec's is that, being the most comprehensive no-fault plan in North America, it provides a useful overview of what a total no-fault system can actually consist of, including its provisions for the individual circumstances of different classes of victims, such as those who are not wage earners. While Michigan has only a partial no-fault system, it is considered by many to have the best definition of a threshold restricting tort action for non-economic losses. Details of both of these plans are included in Appendix B.

We chose not to include a review of the often-mentioned no-fault system in New Zealand, not because it is completely inapplicable, but because it represents the development of no-fault considerably beyond this committee's terms of reference. New Zealand's plan goes beyond automobile accident compensation to cover all accidents—whether in the workplace, the home, or anywhere else—under one scheme. It is our feeling that, since our purview covers automobile accidents only, the Quebec system represents a comprehensive enough scheme for review in this report.

4.3 Major Issues Concerning No-Fault

Over the years since no-fault has been proposed in various jurisdictions and adopted in some, debate has focused on several key issues. Our summary of these issues in this section is not intended to be a comprehensive review (for this, consult some of the items included in the bibliography) or necessarily a statement of our own opinions, but a brief guide to the debate. Each argument or question concerning no-fault is followed by the answer commonly given by advocates of the reform.

Does no-fault prevent automobile accidents?

Some people believe that society should not change a longstanding law in order to reform the compensation system unless it will also help to reduce the number of automobile accidents.

Advocates of no-fault respond that the compensation system addresses the losses caused by automobile accidents, not the causes themselves. Automobile accidents are caused by the interaction of very complex problems that require action on a number of fronts, including law enforcement, education, automobile safety, highway design, and so forth. Accidents are the result of behavioural and environmental conditions, which compensation, it is argued, cannot change.

Is no-fault unfair to the innocent?

Since under a no-fault system there is customarily an upper limit to the amount of indemnification for wage losses, opponents of no-fault argue that some innocent victims would be able to get more compensation and a more accurate assessment of their loss under the fault system—which, in theory, has no such upper limit. Similarly, under fault, there is no restriction to seeking compensation for non-economic losses such as pain and suffering—with the important exception, described earlier, that in Canada the

Supreme Court has in effect established a ceiling to the amount that can be awarded.

Opponents of no-fault emphasize that innocent victims have a traditional legal right to seek full compensation for their losses. Under no-fault, they say, benefits are substantially reduced for innocent victims so that there can be sufficient funds left over to indemnify wrongdoers as well.

No-fault advocates question the significance of the fact that some innocent victims may conceivably receive less compensation under no-fault. The inefficiencies and injustices of the fault system, they argue, seriously detract from the quantity and quality of compensation available for all victims, including the innocent.

Furthermore, it is argued, many so-called wrongdoers have not committed serious offenses but have only made common errors of judgement. The denial of compensation in these cases—and in all cases where the innocent families of wrongdoers suffer—is disproportionate to the relatively minor indiscretions the wrongdoers may have committed.

Does no-fault cause accidents?

Some argue that no-fault actually causes accidents by removing a deterrence against negligent driving, since both innocent and negligent injured parties in an accident are compensated for economic losses according to the same rules.

On the other hand, no-fault advocates question whether fault acts as a deterrent, since the existence of liability insurance under the fault system virtually eliminates the obligation of a negligent driver to personally pay for any losses. They believe the truly effective deterrents are criminal laws, law enforcement, license suspensions, the unpleasantness of accidents, and the fear of death or injury. All of these can be just as strong under no-fault as under a fault system. Furthermore, it is argued, if the mistaken illusion of fault's deterrent value is removed, society could realistically concentrate on more truly effective deterrents, including increased educational efforts to change widespread behavioural attitudes about driving.

Is no-fault more expensive?

If no-fault provides more benefits to more people, some critics believe it will be more expensive than the present system, and thereby increase insurance rates.

No-fault advocates reply that a plan can be designed to match any particular level of funds available. The benefits provided by a no-fault plan, as for those provided by any other insurance plan, can be defined so that the insurance fund can adequately meet all obligations. In other words, the coverages defined (such as on the percentage of wage indemnity and the threshold for non-economic losses) largely determine the rates that are necessary to provide an adequate compensation fund.

While it is true that no-fault expands the insurance fund's exposure to first-party claims (that, after all, is the purpose of no-fault), it also eliminates many of the legal and administrative costs inherent in determining fault and negotiating compensation. The elimination of the large number of small pain and suffering payments made to close files also produces considerable savings.

Any insurance plan is a balance between costs and benefits. No-fault advocates argue that the principal benefit of a no-fault plan is that it can effectively compensate a substantial proportion of all economic losses. Its cost can be defined so that this is accomplished with either an increase or a decrease in insurance rates.

Why not cover all accidents?

If the fault system is so unfair and inadequate in compensating victims of automobile accidents, is it not just as unsuitable for other types of accidents? Would it not be more logical and efficient to have a single system to compensate those disabled by any kind of accident, perhaps even including people disabled by sickness?

The logic of this argument is very appealing, and in fact, it is the solution that was chosen in New Zealand, where automobile, workplace, and all other accidents are compensated

under a single insurance system. Sickness coverage, however, is not included.

Those who argue against this universal approach maintain that, while these other accidents should perhaps also be dealt with on a no-fault basis, it is not necessarily more efficient to combine them under one compensation system. It is better, they say, to implement specific systems suited to specific types of accidents. Workplace accidents, for example, are somewhat different from automobile accidents both in circumstance and resolution.

Furthermore, in the case of automobile accidents, it is argued that there is already a considerable insurance structure established to handle them, and that it would be more efficient to modify this existing structure separately than to combine it with others.

Should non-economic losses remain in tort?

If fault is inequitable and inadequate, why should it be abandoned for economic losses but be retained for some non-economic losses, particularly those suffered by the most seriously injured? Retaining a partial fault system means that it will still be necessary for motorists to secure some liability insurance coverage. In addition, some argue, having a threshold to restrict tort action discriminates against those suffering less serious injuries.

Some advocates of no-fault argue that, since non-economic losses cannot be consistently and objectively measured in dollars, it is impossible to be completely equitable in adjudicating compensation for these losses. In addition, because the compensation fund is limited, the priority should be to compensate the economic losses of all victims, since society will have to meet these costs one way or another. Finally, it is argued by some that awards for non-economic losses under the fault system tend to be particularly inequitable because there is a marked tendency to overcompensate smaller injuries and undercompensate greater ones.

Nevertheless, other people favouring no-fault for economic losses feel that the justice system has developed considerable experience in weighing and compensating

non-economic losses. Perhaps for the very reason that these losses cannot be strictly measured in dollar terms, awarding compensation for them should be left to the legal system. These people usually advocate a partial no-fault system, as opposed to a pure no-fault system. They argue that non-economic losses are real losses that must be compensated in certain cases, such as those involving very serious or permanently disabling or disfiguring injury. Retaining a threshold is considered an acceptable compromise because the savings it makes possible can contribute significantly to support no-fault for economic losses, while retaining the right of the seriously injured to seek additional redress.

Partial no-fault is also viewed by some as a particularly desirable compromise in that it retains some discretion in favour of innocent victims, since only they, through tort, can seek compensation for non-economic losses. Given a public desire to distinguish between the innocent and the guilty, partial no-fault allows that distinction, while still providing everyone with a basic level of protection for economic losses.

Does no-fault increase bureaucracy?

In replacing the fault system's long-established procedures for settling adversary disputes, would no-fault not create additional bureaucracy to deal with other areas of negotiation and dispute? Although fault would no longer need to be disputed when compensating for economic losses, there would still be disagreements over the nature of injury and the amount of compensation due. There would also have to be some kind of appeal system for disputes that could not be settled through regular administrative channels.

Opponents of no-fault argue that a no-fault bureaucracy would be at least as expensive as the present system, and that it would be slower and more cumbersome. They also argue that appeals would be complex, expensive, and if impersonal tribunals are involved, more inhumane.

Advocates of no-fault contend that, in addition to considerable savings in legal costs, a no-fault system incurs less administrative costs than does the fault system. As well

and more importantly, a reformed insurance system, they argue, would operate with a much clearer directive to help victims rather than oppose the legal basis of their claims. Under no-fault, the compensation system takes on much more of a welfare function, which is what no-fault advocates believe the public now expects of insurance for bodily injuries caused by automobile accidents.

PART FIVE

Recommendations

Recommendations

In the first two sections of Part 5, we present our recommendations for major long-term changes to the automobile accident compensation system. In the third section, we offer a number of interim measures which we believe should be instituted pending more thorough reform of the present system. In the fourth and final section, we present a specific plan and its cost implications.

5.1 Extend No-Fault Benefits

Economic losses suffered by automobile accident victims should be compensated exclusively on a first-party basis so that the needs of victims will be provided for without regard to fault, thereby eliminating the burdensome requirement for adversarial action under the tort system.

The principal reason for our recommendation is that third-party liability insurance, which was designed to protect wrongdoers from the financial losses resulting from liability, does not adequately satisfy what we believe is now society's fundamental priority—the security of just compensation for the economic losses suffered by automobile accident victims.

The risk of injury and suffering from motor vehicle accidents has become so pervasive that individuals need adequate protection through a form of insurance provided to society at large. To accomplish this, it is necessary to redirect funds —some of which are now consumed in the adversarial process and some in providing for certain non-economic losses—into compensation on a no-fault basis for all victims.

The elimination of tort and its replacement with no-fault benefits for economic losses is not as great a departure from precedent as it might appear. The basic injustice of the fault system, along with its inadequacy in providing for victims, has long been recognized, not only in numerous studies and commissions, but also by the body politic. In British Columbia, the legislature has on many occasions modified the system to try to improve the victim's chances of getting just compensation. Although the government did not introduce a total no-fault system following the 1969 recommendations of the Wooton Commission, it recognized the need for at least limited no-fault benefits, and established them in law.

The law in British Columbia already recognizes that liability awards are unnecessary to the extent no-fault benefits are provided. In other words, the value of no-fault benefits provided to victims is automatically subtracted from subsequent awards made on the basis of tort. The committee is essentially recommending that no-fault benefits should now be made adequate enough so that no tort action for economic losses is required at all. Compensation would be assured, without the delays, inequities, uncertainties, and waste inherent in the present system—where adversary relations predominate over the simple, straightforward needs of victims. We also propose that all victims be protected should the symptoms of their injury recur or manifest themselves at a later date.

We are not suggesting that a no-fault system would be problem free. Indeed, it would have its own unique administrative challenges and potentials for abuse. All institutions, the present system included, have administrative problems. Insurance bureaucracies are particularly prone to sacrificing compassion in the name of greater efficiency and the elimination of fraud. A no-fault system would have to be carefully designed and administered to operate as efficiently and as free of abuse as possible, while still maintaining a humane service. A no-fault system, however, is at least based on a compassionate goal, whereas in the present system, just

compensation is at best an uncertain by-product.

MINORITY VIEWS

All but one member of the committee are in favour of both removing tort for economic losses and extending no-fault benefits, although several members still feel that some economic losses should be recoverable by tort action. Several members are also concerned that while a no-fault scheme would eliminate unnecessary legal costs, it might generate a whole new area of administrative costs.

The one member who favours retaining the fault system for all types of losses believes that it is fundamentally wrong to require that people carry first-party insurance to protect themselves from the wrongful actions of others. He further believes that the only people to benefit from a no-fault system would be wrongdoers (who now receive no more income replacement than the present, limited no-fault benefits) and those innocent victims who currently get inadequate compensation when the wrongdoer involved is uninsured, has insufficient liability coverage, or is unknown. He does not believe that these cases of inadequate compensation justify doing away with the fundamental right of suing under tort law. Nor does he believe that these cases should be compensated from monies now paid to innocent victims.

The same committee member believes that it is not necessary to eliminate the right to sue in order to afford additional no-fault benefits. Finally, it is also his opinion that most of the abuses and problems (such as delays, inequities, uncertainties, and waste) that are credited to the fault system would also be present in a no-fault system, as evidenced, he claims, by the corporation's present handling of Part VII benefits.

5.1.1 CARE AND REHABILITATION

The cost of care and rehabilitation should be removed from tort, and all reasonable requirements for this care should be provided to all automobile accident victims.

The committee believes society has a fundamental obligation to care for injured people. Victims should receive adequate compensation for all care and rehabilitation expenses when and as they require them, and according to the facilities available at the time. If these benefits are made unlimited there is no need to require tort action in order to obtain them.

Standard of care

What level of care should be provided? At present, accident victims probably receive a better standard of care through the insurance corporation than through any other plan—that is, until their no-fault benefits run out. With unlimited coverage, this standard of care should continue as long as it is needed.

The key word, however, is need. Insurance should provide for all reasonable needs, but not for wants that go beyond these needs. What is reasonable and necessary should be a purely medical and rehabilitative question.

One of the secondary benefits of providing unlimited care would be that it could reduce the considerable confusion, uncertainty, and delay that now arise because help, if there is any at all, is being provided under the auspices of several agencies. Instead, there would be only one rehabilitation authority responsible for providing victims (particularly those with serious or catastrophic injuries) with whatever financial support they need. This support would pay for services and facilities, as well as general rehabilitation counselling, right from the beginning of and continuing through the duration of a victim's disability.

Some of the additional costs incurred from providing these services might be reflected in increased insurance premiums, but there might also be corresponding savings in the cost of other government services whose work load could be reduced.

MINORITY VIEWS

One member of the committee, while agreeing that care and rehabilitation benefits should be unlimited, believes that

victims should retain the right initially to take court action if they are dissatisfied with the benefits provided. He believes, furthermore, that victims can acquire a higher standard of care through tort settlements than what is generally provided through no-fault benefits. He also feels that the corporation is not oriented to providing unlimited benefits of any kind since, as an insurance company, ICBC's natural inclination would always be to close cases in order to limit the corporation's exposure to future costs.

5.1.2 INCOME LOSS

Indemnity for loss of income should be removed from tort, and all automobile accident victims should receive adequate replacement for lost income up to a maximum level which would cover the income of at least 80 percent of the population of British Columbia. The payments for this income replacement and the maximum level provided should both be adjusted annually to reflect increases in the cost of living and in the average B.C. wage. Those with higher incomes should be permitted to purchase supplementary no-fault protection for their income loss in excess of the maximum level provided under this basic plan.

The purpose of this compensation is to ensure that victims and their families do not suffer personal privation due to lost income, whether or not they have other disability coverage. The committee also feels, however, that victims should not receive double indemnity for any losses. Some method should be devised so that the collateral benefits victims receive from other disability coverage provided by government plans (for example, Workers' Compensation, Canada Pension) would be subtracted from their income replacement, or vice versa, as is common for most compensation plans.

On the subject of excess coverage, the committee believes that the basic level of indemnity should be adequate to cover the needs of most people, but that it is incumbent upon the

wealthier individuals in society, who can afford it, to pay for the additional coverage to protect their higher levels of potential income loss.

It is much more difficult to determine the proper level of compensation for victims who do not have a current salary to use as a basis for computation. This would include the unemployed, the self-employed, those unable to work, persons at home, students, and children. Different ways of resolving this problem have been attempted in jurisdictions where no-fault income indemnity is provided, such as Quebec and New Zealand. The committee recommends that these and other systems be studied carefully to design an equitable method for British Columbia. While there is no simple or perfect way to calculate income replacement for a person without a straightforward salary, the committee believes that this shortcoming is neither so irresolvable nor so serious that it should prevent the implementation of the no-fault concept.

MINORITY VIEWS

Two members of the committee are not in favour of removing tort for income loss. One is opposed in principle to removing the right to sue for any kind of loss. The other believes that under the present system most victims already receive adequate compensation for their lost income. Of those who do not, he says, all but five or ten percent either have only minor injuries and suffer little or no income loss; have moderate injuries and suffer a fair (but not serious) amount of loss; are covered by company or personal disability income plans; or have no previous income on which to base indemnity. He does not believe that society should relinquish its right to sue in order to provide indemnity for just those few who, he believes, are not already adequately covered one way or another.

Both of these committee members also doubt the ability of a systematic income indemnity program to provide fairly for the self-employed, owners of small businesses, young people, or the unemployed. They believe that only the courts can do an equitable job of tailoring compensation to

individual circumstances. A no-fault system, they argue, would provide set amounts and limits that are essentially arbitrary, rather than corresponding to actual specific losses of earning capacity.

A third member of the committee, while in favour of no-fault income replacement, believes that all victims should receive a uniform maximum percentage of their lost wages, without any upper limit. He believes that people who happen to earn higher incomes should be as fully protected as anyone else, without having to buy extra coverage.

5.1.3 SURVIVORS' BENEFITS

Indemnity for the economic losses suffered by the spouse and the dependants of a victim killed in an automobile accident should be removed from tort and should be provided exclusively on a no-fault basis. The basic indemnity would be related to what the deceased victim's income was; however, additional levels of indemnity could be purchased on a no-fault basis. Survivors should also receive some form of lump sum benefits, similar to that currently provided under Part VII of the Autoplan regulations.

If a victim later dies from causes unrelated to the accident, the person's benefits should cease and not then accrue to surviving dependants, because these benefits are intended solely to compensate for losses from an automobile accident.

Under the Family Compensation Act, only an innocent victim's surviving spouse and dependants may sue for strictly economic losses. Under the proposed system, the dependants of all deceased victims would be compensated regardless of fault.

Some dependants have sued successfully under the Family Compensation Act for such things as loss of care and guidance, and for loss of inheritance. In the past, common law did not allow survivors to sue for any losses; all claims died with the victim. The right of survivors to sue has since been

opened by legislatures and has become an expanding area of contemporary tort law.

MINORITY VIEWS

Two members of the committee do not support no-fault income indemnity for surviving dependants for essentially the same reasons that they do not support it for surviving victims. One believes that the right to sue for such losses should remain untouched, and that the courts are the only place where fair awards can be made by taking into consideration such highly variable factors as what the likely future income of a deceased would have been, how much the person would have spent on himself or herself and how much on dependants, the likelihood of death from other causes, and the likelihood of the spouse remarrying. The other committee member disagrees with no-fault survivor benefits believing that, for the same reason that people should protect themselves and their dependants by maintaining their own long-term disability program, people should protect their dependants by maintaining life insurance.

A third member disagrees with the committee in that he believes benefits should continue to flow to dependants even after an indemnified victim dies of unrelated causes, since it is very possible that, following an accident, a victim would find it difficult to get adequate or affordable life insurance to provide for his or her family's later needs. Under the tort system, a victim would receive a lump sum award and this would pass into the person's estate. He believes survivors should receive similar protection under the proposed no-fault system.

Some members of the committee believe that, even under the present tort system, survivors (whether dependants or not) should have greater rights to sue for non-economic losses, including the pain and suffering of losing loved ones. Other members, though, feel that no other particular rights should be given survivors beyond no-fault lump sum death benefits, such as those currently provided under Part VII.

5.1.4 ARBITRATION AND APPEAL

Disputes between the corporation and claimants should be settled through the type of arbitration process commonly included as a clause in most insurance policies. Both parties would appoint an arbitrator to act on their behalf. These arbitrators would, in turn, select an umpire to reach a final decision, if they were unable to do so. This final decision could be appealed to the courts.

There must be a form of checks and balances to ensure that all victims receive the compensation due to them. To ensure that there is an avenue of redress outside the corporation, it is essential that victims have a formal means to challenge decisions about their entitlement to compensation or about specific types or amounts of indemnity offered to them. It is also essential, however, that the method of redress be as expeditious as possible and that court action be relied upon only as a last resort, otherwise one of the the main purposes of a no-fault system—its speed and efficiency—is defeated. The arbitration process should settle minor disputes swiftly and economically, leaving only a few that might end up in court.

MINORITY VIEWS

One committee member feels that there should be no recourse to the courts because this would just waste time and money. Another member believes that the arbitration process would be too time consuming. And a fourth member believes that there should be a medical panel constituted in the same fashion as the Medical Review Panel that hears appeals from Workers' Compensation Board decisions. In medical matters, this body would be the final arbiter in any legitimate dispute between a victim and ICBC; and a decision of the panel would be binding upon the corporation.

5.2 Retain Tort for Non-Economic Losses

Victims of automobile accidents should continue to have the right to sue wrongdoers for non-economic damages, but the right should be restricted (by way of a "verbal threshold") to only those victims who suffer serious injury.

The recommendations made thus far cover strictly economic losses, namely lost income and the cost of care and rehabilitation. Under a no-fault system, these benefits can be provided to victims as their needs arise. Non-economic damages, however—which include a victim's pain and suffering, and loss of amenities resulting from an accident—are more difficult to quantify.

Because non-economic losses are so subjective in nature, the committee believes that it would be best to leave the determination of their value in the hands of the courts. Whereas economic losses can be fairly calculated through the mechanisms of the insurance system, the determination of non-economic damages requires a degree of jurisprudence which, in our society, the legal system is best qualified to provide. Judges and juries are qualified to establish the relative values which intangible losses represent for particular individuals.

There is another possible solution to the problem of subjective, non-economic losses, and that is to make awards for these damages according to a pre-determined schedule that provides a range of specified amounts correlated to specified losses. Quebec, for example, has chosen this approach, and has eliminated all tort action for automobile accident losses.

We do not recommend this solution for British Columbia. We believe, instead, that the right to sue for non-economic damages should be retained. This is partly an outcome of our own feelings and partly a response to public opinion. Although the public appears to favour the protection of all victims from economic privation without regard to fault, the public also favours some advantage being given to innocent

victims. While not compromising the security of compensation for the economic losses suffered by all victims, such an advantage for innocence can be preserved by continuing to allow the right to sue, but only for non-economic losses. Retaining tort for these losses also preserves an avenue for victims to seek what they may perceive as retribution against their wrongdoers, although, as was pointed out earlier in this report, it is doubtful that retribution is ever really satisfied through the fault system.

Threshold

While the committee unanimously recommends the retention of tort for non-economic damages, a majority of us also believe that there must be a threshold established, below which court action for these damages is not permitted. The objective of having a threshold is to conserve the insurance fund needed to compensate the economic losses of all victims on a no-fault basis by restricting tort actions for the recovery of non-economic losses to more serious injuries only.

The cost of compensating the economic losses of all victims, including those not so compensated before—wrongdoers, spouses restricted by law from suing, students, the unemployed, and so on—can only be met by raising premiums or reducing costs. As has been discussed previously, one area where savings should be made is in the disproportionately high pain and suffering compensation paid out in the large number of insignificant or relatively minor injury cases—cases which also consume a disproportionately large amount of administration and investigation costs. The money spent in these cases should really be directed to the benefit of victims with more serious injury.

It may appear cruel or unfair to deny anyone compensation for the pain and suffering of even a minor injury. But the primary purpose of insurance is to compensate people with losses that create real hardship. Indemnifying policyholders for all losses would be impractical because both the award and handling costs of providing compensation for the very large number of small claims would deplete the fund needed for more serious losses. It is for this reason that most

property damage insurance policies have some form of deductible amount, below which claims are not permitted. A threshold for non-economic, personal injury losses would serve a similar function.

MINORITY VIEWS

Three committee members would prefer a total no-fault compensation plan that would eliminate tort for any losses. They believe that non-economic losses cannot be any more equitably determined through the fault system than can economic losses, and that it would be fairer and more efficient to compensate for pain and suffering or loss of amenities according to a fixed schedule of benefits instead of having these subjective values determined by the courts. These three members are, however, prepared to accept the committee's recommendation because they believe that retaining the right to sue in this one area makes the overall plan for no-fault benefits more acceptable.

Three other committee members, while agreeing that tort should certainly be retained for non-economic losses, do not agree with the imposition of a threshold. One of these members believes that the insurance corporation should simply establish firmer administrative controls that would restrict these awards at the lower end of the scale. He fears that a threshold would only open another whole area of wasteful litigation challenging the definition of the threshold. The other two members who object to the concept of a threshold believe that a person's right to sue for non-economic losses caused by wrongful damage should not be restricted in any way whatsoever.

These members also believe that it would be improper to redirect the money currently awarded to innocent victims for their non-economic losses so that the compensation fund could provide better or additional benefits for other victims, particularly for wrongdoers. Several other committee members are also wary of any plan that might take money away from the innocent to provide benefits for wrongdoers.

One of the members opposed to a threshold believes that, rather than by limiting the right to sue for non-economic

damages, the funds necessary for extended no-fault benefits could be obtained in two ways: by reducing the administration costs of insurance; and by reducing the number and severity of claims through an effective campaign to promote seat belt use and to deter driving while impaired, combined with increased enforcement of seat belt and impaired driving regulations, plus stiffer penalties for infringements of these regulations.

5.3 Interim Measures

Given the importance and the implications of our recommendation that the current system of compensating automobile accident victims be replaced by a no-fault method for indemnifying economic losses, it is unlikely that such a reform will be instituted in less than several years, if at all. It will require considerable public review and, ultimately, a fair amount of political resolve to enact legislation that would inevitably be unpopular with some segments of the population, including some powerful special interest groups.

Since it is unlikely, then, that a no-fault scheme will be enacted in the immediate future, the committee believes that a number of interim measures should be taken to ameliorate a few of the problems in the present system. It is important to note, though, that these interim measures will not rectify all of the problems, as this is impossible within the confines of the fault system. Furthermore, the cost of some of these interim measures may require an increase in insurance premiums, because there is no place in the present system to make the significant savings that would be needed to redirect funds for improved benefits.

5.3.1 ADEQUACY

Minimum liability limits

The present third-party minimum liability limit should be increased from $100,000 to somewhere in the range of $300,000 to $500,000.

The purpose of raising the minimum limit is to provide more adequate protection for victims of catastrophic injuries, hit-and-run accidents, and accidents where wrongdoers have minimal or no coverage. Determining what this upper limit should be is difficult. On one hand, it should perhaps be high enough to cover nearly all eventualities. But on the other hand, instituting a higher minimum limit means requiring a greater increase in premiums for those policyholders who currently have lower limits.

An increase to $500,000 reflects solely what would be appropriate in the interest of the vast majority of accident victims. A small increase may be appropriate, however, considering the public's ability to afford the higher indemnity level, the effect a higher limit would have on some premiums, and the fact that $500,000 would be five times higher than the present level.

The committee has also debated the possibility of recommending that there might be no limit on liability, as is the case, for example, in Great Britain. If a no-fault system for economic losses is not introduced, unlimited liability would resolve some of the inadequacies of the tort system. But it would be expensive, and there is a particular disadvantage in our proximity to the United States, where extremely high tort awards for non-economic losses are common. Legislation to enact unlimited liability in British Columbia would probably have to incorporate some kind of limitation on coverage in other jurisdictions.

For these reasons, the committee is recommending, as an interim measure, a very substantial but not inordinate increase in the minimum third-party liability limit.

MINORITY VIEWS

Several committee members would prefer an even higher limit or no limit at all. One member believes that having no limit would solve many of the shortcomings for which the present system is criticized, and would make a complete no-fault system for economic losses unnecessary.

Accident benefits—care and rehabilitation

The present limit of $100,000 on Part VII no-fault care and rehabilitation benefits should be eliminated so that there will be no dollar limit on these benefits.

The committee is in unanimous agreement that no accident victims should suffer from lack of reasonable care and rehabilitation because their benefits have run out. Relieving human suffering is paramount, and the cost of it must be

borne as part of the cost of having an automobile culture. Furthermore, the cost of this unlimited benefit will not be too great an additional burden on policyholders since most injuries are already adequately covered within the present $100,000 limit. The relatively few victims who will gain from doing away with the limit are the victims of very serious or catastrophic injuries—and they deserve full protection.

MINORITY VIEWS

An additional concern on the part of some committee members is that there should be some way to establish lines of communication between victims' doctors and the corporation. At present, this vital communication often ceases when a victim engages the services of a lawyer and all subsequent communication is restricted to only that between the lawyer and the corporation. While this is a natural outcome of the adversarial process, several committee members believe it is such a serious problem that some effort should be put into solving it.

Accident benefits—weekly indemnity

The limit on weekly no-fault disability payments should be increased as much as possible in proportion to the increase in average British Columbia wages since the benefits were first enacted.

The committee does not propose that the nature or purpose of the weekly indemnity be changed. It should remain a relatively moderate amount intended to help alleviate the needs both of innocent victims pending resolution of liability claims and of wrongdoers. To increase the benefit more than this, without reforming the present tort system, would require too great an increase in insurance premiums.

Nevertheless, it is commonly acknowledged that the current limit of $100 per week is inadequate and that it has not kept pace with the increase in average incomes. When the weekly disability payment was first introduced in 1970,

it represented 36 percent of the average weekly wage in B.C. (according to the industrial composite published by Statistics Canada). The weekly disability payment effective 1983 represents only about 20 percent of the average weekly wage (refer back to graph 3.1). If these benefits had kept up with increases in wages, the amount today would be approximately $175 per week.

Ideally, we would like to see the weekly limit raised so that it maintains the same relationship to average wages as when it was first established. We recognize, however, that this may have to be carefully phased in so as not to require too great an increase in insurance premiums at any one time, particularly given the present state of the economy.

The committee also recommends that:

Victims receiving Unemployment Insurance should also be allowed to receive Part VII weekly indemnity benefits, as long as their combined total does not exceed 80 percent of a victim's net income before an accident.

The present Autoplan regulations do not allow victims to receive the weekly indemnity if they are currently receiving UIC payments. The committee does not believe this is fair. If the weekly indemnity helps victims to achieve as nearly as possible the income they had before an accident, it should not be withheld simply because they are also receiving UIC, which—unlike Workers' Compensation indemnity—often does not compensate a person to that level.

Accident benefits—death benefits

No-fault death benefits should be increased as much as possible in the same proportion as recommended for weekly indemnity benefits.

Our reasoning for this recommendation is essentially the same as that for increased weekly indemnity: not to change the purpose of death benefits, but to increase them so that they regain their original value in relation to average British Columbia incomes.

Accident benefits—disputes

The same method for resolving disputes that the committee recommends be adopted in a new compensation system should be adopted as an interim measure for resolving disputes arising out of current Part VII no-fault accident benefits.

Our reasons for this recommendation, as well as minority views in opposition, are the same as those stated in section 5.1.4.

5.3.2 TIMELINESS

Advance payments

The corporation should reaffirm its policy and increase its practice of providing advance payments to help meet victims' needs prior to the settlement of a liability claim. As a legislative encouragement for advance payments, Section 24 of the Insurance (Motor Vehicle) Act should be amended so that courts are provided with the authority to deduct advance payments from liability awards and to take them into consideration when determining pre-judgement interest.

Although the corporation already has a policy of making advance payments when there is no question of liability, the committee believes that this policy needs to be strengthened administratively since there is still a tendency on the part of some adjusters to withold payment until final settlements are reached. It is also important that the size of advance payments be proportionate to a victim's actual needs and that the payments be sufficient enough to help prevent further annoyance or discomfort for the victim.

The purpose of the second part of the recommendation is to make certain that advance payments are automatically subtracted from liability awards by giving this process legislative authority. Under the existing legislation, no-fault benefits are accorded this status, but advance payments made

against liability settlements are not. In practice, when victims accept an advance payment, they must agree, without prejudice to their case, that the amount of the payment will be subtracted from any eventual liability settlement. Even though this agreement serves as a legal contract and prevents double payment, it may not receive official recognition in court, and pre-judgement interest may not be reduced by any amounts paid in advance. This possibility acts as a disincentive to making advance payments.

Sanctioned advance payments would be an advantage to both victims and the corporation. If advance payments reduced pre-judgement interest, adjusters would be more inclined to offer them. Provided with advance payments in addition to no-fault accident benefits, victims would be under less pressure to engage in lengthy litigation in order to obtain a settlement. Advance payments should, however, continue to be accompanied by a clear explanation that acceptance of the funds does not prejudice a victim's rights. Furthermore, advance payments should not be used by the corporation solely to reduce pre-judgement interest, but should be provided primarily to relieve the hardship of delays pending settlement of third-party liability claims.

MINORITY VIEWS

One committee member, while believing that advance payments should be more systematically provided, does not feel that the proposed legislative change is required to accomplish this because an agreement for an advance payment signed by the corporation and a victim already covers the contingency of pre-judgement interest.

Structured compensation

Courts should be provided with legal authority to order, if they deem it to be appropriate, that upon the application of either party to an action, judgements be paid on a periodic basis. A draft for legislation proposed to enable this authority is included in Appendix C.

Structured compensation is a method of providing indemnity on a scheduled basis rather than in a lump sum. This can be accomplished either through a structured settlement resulting from a negotiated settlement or a periodic payment resulting from a court judgement. At present, since the courts do not have the authority to order periodic payments, they are used only when both parties agree to them.

There are several advantages to structuring compensation:

- The schedule and payment amounts can be designed to correspond, as near as can be predicted, to a victim's actual circumstances and needs, which is the intent of compensation.
- Structured compensation prevents the possibility of a victim squandering or otherwise mismanaging the money that will be needed in future years.
- It can help ensure that the award is used for what it was intended—replacement of lost income and expenses for care and rehabilitation, which typically occur on a periodic basis, not at one time. The award, however, can also be designed to provide lump sum amounts to cover larger investments or purchases when that is desirable.
- It can eliminate the expense of paying for investment counselling for victims.
- Victims can receive greater net benefits because income from an annuity established for compensation is not taxed, unlike a victim's own investment income generated from a lump sum payment.
- An insurer providing a victim with the service of an annuity can provide better security for a long-term flow of income than most victims can provide for themselves.

In summary, structured compensation benefits both victims and the overall compensation fund—which, in turn, benefits all victims. It is a more finely tuned way of allocating the money accumulated specifically for compensation.

MINORITY VIEWS

Several members of the committee oppose this recommendation in differing degrees. One believes there should be no provision at all for the courts to order periodic payments, but that ICBC should provide investment counselling

instead. He also believes that victims want to put the experience of their injury behind them, and that stringing out payments only delays this. He and two other committee members also believe that many victims can provide better returns for themselves through individually tailored investments.

These two committee members, and one other, believe that the courts should be able to provide structured compensation, but only when both parties agree; in other words, it should be entered into only on a voluntary basis, and not simply because one party believes it may be desirable. These members also feel that victims should be granted the dignity of managing their own affairs, just as they would with any other asset. The majority of the committee, however, believes that compensation should not be treated as just another asset, but as a special fund directed to a special purpose.

Offer of settlement

The B.C. Supreme Court Rules should be amended to institute a procedure called "offer of settlement." This procedure would allow a defendant (or the insurance corporation or any other insurer acting on behalf of a defendant) to offer the plaintiff or plaintiff's lawyer (if the person is represented) an amount which the defendant feels is the value of the claim. The offer would be broken down by the different heads of damage, including any necessary allowance for pre-judgement interest. The plaintiff would be allowed to accept this money as a settlement of the claim; or as an alternative, the plaintiff could accept the money but also commence litigation for the excess which he or she believes the claim is worth.

In the event of judgement, court-ordered interest would apply only on the excess. If a judgement does not exceed the amount previously offered, costs would be awarded to the defendant. If the money offered by the defendant is returned by the

plaintiff or the plaintiff's lawyer, the evidence of that offer would be produced in any subsequent litigation, and no interest would accrue on that portion of any judgement from the date of the offer. To ensure their propriety and adequacy, any such offers made by an adjuster of the corporation would have to have the written approval of a lawyer in the corporation's legal department or that of an outside lawyer hired for this purpose.

The purpose of this recommendation is to provide an incentive for parties to assess losses realistically and to reach agreements sooner. An offer of settlement would provide a disincentive for lawyers to delay cases solely in order to build up pre-judgement interest. It would also help to reduce the number of cases going to court. But above all, offers of settlement would provide victims with a much-needed cash flow, while still allowing them the option of suing if they felt they were entitled to more compensation than was offered.

Under common law, defendants were entitled, before legal action commenced, to offer the amount they considered due and payable, but only in cases involving the recovery of a debt or a specific sum of money, and not in cases where the plaintiff was seeking damages for an alleged wrongdoing. In Ontario, however, this right has been extended to include tort as well as pecuniary cases.

The committee recognizes the concern that, in tort cases, the demands for damages could be escalated and that court awards could be prejudiced if offered settlements are disclosed and become part of the pleadings. To prevent this, the committee recommends that an offer of settlement, once declined, would be "paid into court" at the commencement of action. Payment into court is a formal process that prevents disclosure until after the court makes a judgement. This practice would be consistent with what is currently the case for any offers made during an action by a defendant prior to trial.

Another concern about offers of settlement is that they could be used as a tool to frighten claimants into settling too early or for an inadequate amount. To prevent this from

happening, the committee recommends that the legislation should carry a proviso that an offer of settlement can only be made by the corporation on the advice of counsel. An offer should only be presented after study by counsel of the particular case to ensure that the amount correctly reflects a fair settlement and one that would likely be reached if the case went to court. An offer of settlement should not be used to persuade a victim to settle prematurely or inadequately. The legislation should also establish that an offer of settlement would not prejudice a claimant or any person claiming through that person in the future, nor serve as an admission of liability.

MINORITY VIEWS

One member of the committee is opposed to this recommendation because he does not believe that lawyers delay court action in order to build up pre-judgement interest. Lawyers only delay cases, he believes, when it is in a client's best interests to do so, such as when waiting for an injury to stabilize so that losses can be fully determined.

This committee member also believes that an offer of settlement by the corporation might encourage a premature assessment of damages, since the extent of loss often cannot be accurately determined without going through the entire legal process, including the presentation of medical reports, statements from employers, and the accumulation of other essential information. He also believes that the corporation might use offers of settlement (and the role of the lawyer who determines an offer) as a tool to intimidate claimants into settling for lower amounts. He adds that, if an award ends up being lower than what was already offered before legal action commenced, the corporation might attempt to reduce a victim's award further by asking that legal costs be subtracted from it on the argument that court action was a waste of time and money.

Time limitation for accident benefits

To protect individuals suffering a recurrence or late manifestation of injury, the limitation on the

commencement of an action for no-fault accident benefits (as stated in Section 7.37, Part VII of the Insurance (Motor Vehicle) Act) should be modified so that from the incurrence of an expense victims have one year to claim indemnity.

Currently, the time limit for making claims under Part VII is one year from the date of an accident or one year from the last payment of a Part VII benefit, whichever period is later. The purpose of our recommendation would be to ensure that victims can still be reimbursed for an expense beyond this period in case they suffer a recurrence or in case an injury manifests itself sometime after an accident. For any right of action to exist, however, there would still be a requirement that accidents must be reported within 12 months. This measure would also require that claims for expenses be submitted promptly.

5.3.3 EFFICIENCY

Contingency fees

Contingency fees are inappropriate in cases where liability is not seriously in dispute. When contingency fees are appropriate, however, the percentage charged should be graduated according to the size of the award, with smaller percentages being charged for larger amounts. Party and party costs awarded by the court should, as a general rule, be credited to the client.

It is the responsibility and duty of lawyers, at the time of presenting a bill, to advise clients of their right to have the bill taxed by a registrar of the Supreme Court. Access to this taxing should be easy both for lawyers and their clients.

The above recommendations represent a consensus of committee views about this very contentious subject. Individual members have differing opinions, which are summarized below.

MINORITY VIEWS

Two committee members believe that, based in part on a survey conducted by the Law Society of B.C., abuse of contingency fees is not a widespread problem. Other members, however, doubt the results of this survey, since many clients may not be challenging their lawyers' fees for a variety of reasons.

Some committee members believe that contingency fees are essential to protect the public's access to the courts. Without these fee arrangements, they believe many people could not afford legal services. Other members reject this view, saying that alternative ways of guaranteeing court access have been developed in jurisdictions where contingency fees are illegal, including Great Britain and four Canadian provinces. The best solution, several feel, would be to make public legal aid available to plaintiffs in tort cases.

One member dismisses the argument that victims need to rely on contingency fees because they cannot afford monthly billings. The majority of cases taken by lawyers for a plaintiff, he says, are sure winners; if a plaintiff was clearly and solely responsible for an accident, obviously a lawyer would not take the case or advise the client to sue. Thus, in the cases that lawyers do take to court, he argues, only the amount to be obtained is usually in question. This amount may be reduced by various factors, but only in a small number of cases is there a risk of getting nothing at all. Since the client is bound to win, he concludes, most lawyers should be willing to charge their clients on the traditional basis of an hourly fee plus expenses and to submit their bill at the completion of a case, rather than insisting on a contingency fee or interim billing.

Two members believe that contingency fees, as a form of champerty, should be totally prohibited in British Columbia. Two other members believe all contingency fee contracts should be reviewed by the judge in each case, although two other members say this would waste too much court time and involve additional legal costs. Several other members believe that legal costs should be added to court awards

so that they are not subtracted from the amount the court has decided victims need.

Finally, one member feels that the committee should not be examining this subject at all, particularly since it is currently under review by both the Law Society and the Ministry of the Attorney-General. The subject of contingency fees, he argues, is not part of the committee's mandate, and he is against restricting these fees only to cases where liability is seriously in dispute.

The majority of the committee, however, believe that this issue is very much part of the committee's mandate since legal fees subtracted from awards have a direct and severe impact on the adequacy of compensation. Contingency fees take money away from individual victims, and legal costs as a whole detract from the overall compensation fund. If tort for economic losses were removed, contingency fees would not be a serious issue because they would be restricted to cases for non-economic losses. In the interim, however, it would be worthwhile to improve the system's economic performance by restricting the impact of contingency fees through closer regulation.

Special damages and pre-judgement interest

Income loss should be defined as an item of special damages.

As explained earlier, in British Columbia all income loss, including pre-trial income loss, is currently an item of general damages. Because of this categorization, when an award is made by the courts, the pre-judgement interest is calculated as if all of the income loss had occurred on the date of the accident (that is, the date that the loss occurred). Since, however, income loss occurs periodically over time, pre-judgement interest should be calculated on a periodic basis. Otherwise, a successful plaintiff receives more interest as part of the award than is justified. This takes money out of the insurance fund that should properly be directed to actual losses.

Classifying income loss as an item of special damages would ensure that pre-judgement interest is calculated on a

periodic basis. Since there is some indication that the courts have begun to accept this categorization without legislative change, it may not be necessary to amend the provincial Court-Order Interest Act. If this trend does not continue, however, the committee believes the act should be amended.

5.3.4 INTELLIGIBILITY

Public information and education

The corporation should continue its present efforts to inform claimants about their rights and what they should expect in the course of making claims. Efforts should also be made to educate the general public about the present fault system and about no-fault alternatives.

As was pointed out earlier, the committee was surprised by the extent of misunderstanding about the present compensation system. Short of simplifying the system by changing it, there is no way to make its basic nature more intelligible. The purpose of this recommendation, however, is to encourage the corporation, and other bodies as well, to do the best job possible of providing the information that will help people to at least cope better with the complexities of automobile insurance as it now exists.

ICBC has embarked upon a new series of publications designed to help victims and other claimants deal with specific compensation problems. We commend the corporation for this work and encourage that it be continued. In the insurance business, there is often a reluctance to publish very much information about insurance matters out of fear that something printed might be misinterpreted and then used in court against the insurer. While this concern for the subtleties of law is understandable, the need for a better informed public is more important.

The committee also believes that there is a need to educate the public about the very nature of the fault system and its principal alternative, the no-fault system—and about the arguments for and against these alternatives. Even the name

"no-fault" is misunderstood since it suggests to some that people would be completely free to do whatever they wanted "without fault."

MINORITY VIEWS

One committee member believes that there is no mandate for ICBC to inform the public about no-fault, and that to do so would be an unjustified act of proselytism. He also believes the present system can itself be made more intelligible to victims and the public at large without having to simplify it by eliminating tort.

5.4 The Proposed Plan and Its Costs

Thus far, the recommendations have described in general theoretical terms the changes we believe are necessary to improve the automobile compensation system. To fulfill our mandate, however, we had to design an actual, detailed insurance plan so that the cost implications of our recommendations could be assessed. Though we do not feel it must be adopted in every detail, this plan provides the essential components required to meet the criteria we have established for a just and secure compensation system.

The two parts of the insurance plan are outlined in detail in the following two sub-sections: no-fault first-party coverage for economic losses, and residual third-party liability coverage to protect motorists from the risk of causing non-economic losses in an automobile accident. This residual coverage would also protect B.C. motorists against liability claims arising from accidents outside of the province. (Hereafter in this section, "the plan" refers to the complete plan as proposed below and to the organization administering the plan.)

The third and fourth sub-sections deal directly with the issue of cost. The first of these two presents the cost implications of the proposed plan, including both no-fault benefits and residual liability coverage; and the final sub-section presents the cost implications of the committee's interim recommendations.

5.4.1 NO-FAULT COVERAGE

The plan proposed by the committee consists of basic no-fault benefits that cover the needs of the majority of the province's population. The basic plan would be supplemented by additional levels of no-fault income protection purchasable as an option to those with higher than average incomes.

The following describes the no-fault plan as if it were applicable in 1983.

Coverage for all B.C. residents

The proposed no-fault benefits would take the place of the right to sue for economic losses and would cover all residents of the province injured or killed in accidents inside or outside B.C. It would not be necessary to be named in a valid insurance certificate or to hold a particular status in relationship to the named insured. All residents would have a right to compensation for economic losses.

There would only be a few exceptions to this universal coverage. First, non-residents injured in accidents in B.C. would be entitled to the no-fault benefits, but only to the extent that they are not at fault in an accident. Related to this provision, the plan would be entitled to recover from non-residents the value of any benefits it pays to victims as a result of accidents for which the non-residents are found liable.

For accidents outside of B.C. in those places where the tort system still prevails, B.C. residents would still be covered by the province's no-fault plan, but would also be entitled to recover any additional amounts not compensated by the plan. The plan would also have the right to recover the value of benefits it pays to B.C. residents as the result of accidents caused by non-residents outside the province.

The plan would exclude protection for certain types of accidents—such as those in the course of an automobile race —which are clearly not intended to be covered or are better covered by other plans.

Unlimited care and rehabilitation

The proposed no-fault plan provides for reasonable, unlimited care and rehabilitation expenses for all victims—with the principal purpose of allowing them to resume employment when able and to maintain a lifestyle as comfortable as possible. The plan covers medical rehabilitation, vocational training, specialized equipment, and home care, such as services of a homemaker.

The cost of medical and hospital services is covered to the extent not covered by existing public plans. The various

public health plans would no longer be allowed to recover their costs from the automobile insurance plan. Previously, the public health plans were entitled to recover their costs through the process called subrogation, but these costs were strictly related to fault, which would no longer apply in a no-fault system.

Income replacement

All victims disabled as a result of an automobile accident would be entitled to an income replacement annuity. Income replacement would be paid until victims resume their regular employment or an employment suited to their ability.

Disability is covered after a waiting period of seven days from the beginning of the disability. Income replacement would only be paid for disability that lasts beyond the first week. The reason for the waiting period is that most workers are already covered by sick leave plans at their place of employment. Also, the waiting period eliminates a large number of small claims for which compensation is not warranted when compared to claims for more serious injuries.

The amount of income replacement annuity would vary according to the basis of a victim's occupation:

1. Victims who were employed full-time

   A victim's previous take-home pay represents the economic value of the loss incurred, since the loss results from the person's inability, because of the injury, to pursue employment, or engage in an employment for which reasonably suited based on the person's skills and abilities.

   For these victims, the income replacement annuity would be equal to 90 percent of the net income derived from their employment at the time of the accident. The full 100 percent of gross income would not be provided because this would, in effect, disregard the amount of income taxes normally paid, and thereby result in overcompensation. The reduction ensures that the income replacement would not be taxable. Also, it is reasonable to deduct some portion to represent the minimal expenses normally incurred to earn that income. Furthermore, it is important to avoid overcompensation so that there is a sufficient incentive to return to work as soon as reasonably possible.

Under the plan, wages are covered up to a maximum gross ceiling of $33,000, which is estimated to cover the wage level of approximately 80% of the B.C. population. Rather than expect the majority to cover the higher losses of higher income earners, the latter would be given the option to purchase additional no-fault protection, which it is assumed they can afford.

The maximum payable by the plan (once again, as if it were effective in 1983) would be $21,961 per year, or $422 per week, for a single person without dependents; and $23,088 per year, or $444 per week, for a married person without children. Examples of the benefits provided for other typical wage levels and family situations are given in Table D.1, Appendix D.

To ensure a minimum level of subsistence, the minimum payable in any given case would be $135 per week (or about $7,000 per year), plus $17 per dependent per week (without a maximum on the number of dependents so covered).

2. Victims who were unemployed, part-time workers, or casual workers

Victims who were not employed on a full-time basis or unemployed at the time of the accident would also be entitled to an income replacement annuity. The loss that they incur results from their inability to engage in their occupation or to seek new employment because of the injury.

For these victims, the income replacement annuity would be based on their earning capacity in an employment which corresponds to their physical and intellectual abilities. The annuity would be equal to 90% of the net income they would earn from that employment.

The minimum payable would be $135 per week or approximately $7,000 per year.

3. Victims who were full-time students

This category includes students, aged 16 or more, who on a full-time basis attended a secondary school or a school of a higher level. The loss incurred by these victims comes from their inability to pursue their studies, their inability to maintain or engage either in part-time or seasonal

employment, or the delay they experience in entering the labour market.

Until the age of 18, students would be entitled to the minimum income replacement of $135 per week. After that age, if they are still disabled from the injury, the income replacement would be equal to 90% of the net income derived from a gross income equivalent to the average B.C. weekly wage. The amount of this annuity currently would be $14,148 per year, or about $270 per week. If the victim was engaged in part-time employment or (reasonably certain) seasonal employment, the income replacement would be based on the gross income derived from such employment, for as long as it would have been held.

4. Victims who are minor children

   These victims include children aged 16 or less. The disability loss they incur results from their inability to pursue their studies and the inconvenience to their parents of any special care the victims require.

   Until the age of 18, children would be entitled to the minimum income replacement annuity of $135 per week. After that age, if the victim is still disabled, the income replacement would then be equal to 90% of the net income derived from a gross income of 75% of the average B.C. weekly wage. The amount of this annuity would currently be $11,044 per year, or about $210 per week. The reason for this group's lower annuity at age 18, when compared to the student group described above, is that children have realized their earning potential to a much lesser extent than full-time students have.

5. Persons at home

   These victims include spouses who are not the principal bread-winner and live at home for reasons other than impairment or disability. The loss they incur results from their inability to pursue their daily activities and the need to get some form of replacement for the services they previously provided to their families. For these victims, the income replacement annuity would be determined in the same fashion as for those who are unemployed or without full-time employment; that is, it would be equal to 90 percent of the net income derived from their earning

capacity in an employment situation. These victims would also have the option to receive, instead of an income replacement annuity, full reimbursement of reasonable costs for replacing services, up to $250 per week.

6. Victims who were unable to hold employment at the time of the accident because of impairment or disability

   The loss incurred by these victims results from the inconvenience of the additional injury and the inability to engage in activities common to people in their condition. Such victims would be entitled to the minimum income replacement annuity of $135 per week.

7. Victims aged 65 and over

   Victims aged 65 and over would also receive income replacement. The loss incurred by these victims results from the inconvenience of the injury and the loss of earning, since many people work beyond the age of 65. For an initial period of five years, the amount would be based on their income earning capacity in a full-time employment. After that period, the amount would be the minimum, $135 per week.

Death Benefits

The proposed plan would provide both annuities and lump sum payments to the survivors of victims killed in automobile accidents. Loss of financial support incurred by the spouse and dependants would be compensated by an annuity related to the income the deceased had earned.

In addition to the annuity, certain lump sum payments—similar to those currently provided by the Part VII no-fault accident benefits of Autoplan—would be paid to parents, the spouse, or the dependants of victims killed.

1. Victim with a spouse and dependants

   The death of the victim would entitle the spouse (until the spouse's death) to an annuity equal to 55 percent of the income replacement annuity the deceased victim would have received had he or she not died. An additional amount equalling 10 percent of the income replacement annuity would be payable for the second dependant, plus

an additional 5 percent for each dependant after the first, up to a total amount not exceeding 90 percent of the income replacement. If the spouse is absent, the annuity would be payable to the first dependant.

For a spouse without children and under the age of 35, the annuity would be payable for five years.

For spouses with children and spouses over the age of 35, the annuity would be payable for life or until the spouse remarries. In any case, the annuity would be payable for a minimum of five years.

Upon the remarriage of a spouse before the entitlement to an annuity ends, a lump sum equivalent to one year of the survivor's annuity would be payable.

The survivor's annuity would also be subject to the minimum amount of $135 per week plus $17 per dependant per week.

For additional information regarding the annuities that would be payable to survivors in typical situations, see Table D.2 in Appendix D.

2. Lump sum death benefits

The death of an adult without dependants or the death of a dependant does not result in an economic loss per se. Nevertheless, in such cases it is the practice under the present accident benefits coverage to pay a small lump sum anyway.

Part VII also currently provides the dependants of a deceased victim with lump sum payments concurrently with weekly death benefits. The committee proposes that this practice should continue. The proposed plan would provide the following lump sum payments:

Category of victim	Lump sum payable
Victim without parents and dependants	$1000 payable to estate
Victim with parents	$5000 payable to parents
Victim with spouse	$5000 payable to spouse
Victim with dependants	$1000 payable to each dependant

capacity in an employment situation. These victims would also have the option to receive, instead of an income replacement annuity, full reimbursement of reasonable costs for replacing services, up to $250 per week.

6. Victims who were unable to hold employment at the time of the accident because of impairment or disability

   The loss incurred by these victims results from the inconvenience of the additional injury and the inability to engage in activities common to people in their condition. Such victims would be entitled to the minimum income replacement annuity of $135 per week.

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Victim with parents	$5000 payable to parents
Victim with spouse	$5000 payable to spouse
Victim with dependants	$1000 payable to each dependant

Other provisions

The proposed plan would also cover the following:

1. Funeral expenses of up to $2,000.
2. All reasonable expenses—clothing, transportation, and so forth—incurred as a result of an accident.

Disability pensions payable under the Canada Pension Plan, Workers' Compensation, and any pension received under the Old Age Security Act would be deducted from the income replacement pension of the proposed plan.

Annual adjustments of no-fault benefits

To preserve the economic value of benefits paid by the plan, all annuities would be increased each year to reflect the increase in the Consumer Price Index. In addition, the size of lump sum benefits and the ceiling of gross income would also be adjusted each year to provide a sustained level of coverage.

Optional protection for higher income earners

The committee has recommended that income loss higher than the basic levels described above should be compensated on a no-fault basis through supplementary insurance coverage available to those with higher incomes.

5.4.2 RESIDUAL LIABILITY COVERAGE

This part of the plan would cover two areas where tort liability remains. First, since non-economic losses would remain in the plan we recommend, all motorists would be required to carry liability insurance coverage to protect themselves in the event they are found liable for causing non-economic losses which innocent victims are entitled to recover.

Second, since the tort system would still prevail for accidents occurring in most places outside B.C., the residual liability insurance coverage would protect B.C. motorists in the event they are found liable for injuries caused outside the province.

Threshold on liability for non-economic losses

To make the total plan financially viable, it is necessary to restrict access to the recovery of non-economic losses. The committee believes that the most effective and fair way to accomplish this is by way of a verbal threshold. We are not prepared, however, to propose a specific wording, because this must be done very carefully and after considerable, further consultation. Acceptable solutions have been proposed in other jurisdictions, notably Michigan, and these may well suit the purpose we have identified.

We believe that limiting non-economic losses to only those victims with permanent injuries would be too severe a restriction for those victims who may suffer several years without permanent injury. Also, the committee rejects the concept of a threshold based on the length of a disability, because we believe it would lead to abuses.

To achieve the objective of creating sufficient savings in non-economic losses in order to make the no-fault compensation for economic losses financially viable, a reduction of approximately 80 percent in the number of tort recoveries would be necessary. (The majority of these claims are minor injuries settled without resort to litigation.) This would bring about a reduction of roughly 20 percent in the cost of total tort recoveries in the present system.

The existence of the threshold would not reduce the size of non-economic loss awards granted to those victims whose injury exceeds the threshold. These awards would be set, as they currently are, by court decision and earlier precedents.

Coverage for accidents outside of B.C.

Since the tort system would still prevail in most jurisdictions in North America, B.C. motorists could still be held liable for injuries they cause outside of the province. The proposed plan would provide protection from this possible liability through the residual liability coverage.

5.4.3 COST OF THE PROPOSED PLAN

The committee's evaluation of the proposed plan's cost encompasses both the basic no-fault plan and the residual liability coverage. It does not include the optional supplementary no-fault coverage for individuals with higher incomes since this coverage would be unnecessary for the vast majority of motorists.

The meaning of cost

Some explanation is appropriate regarding exactly what is meant by cost. The public often considers premiums to be the cost, but this is not quite correct. For example, expenses incurred directly by victims themselves in order to obtain compensation are not part of the premiums paid by motorists.

The cost of a plan is made up of the costs of compensation benefits paid to victims, plus the legal and administrative expenses necessary to provide that compensation. In a no-fault plan, the cost of benefits includes all sums paid as compensation directly to victims or their survivors. In the tort system, the cost of benefits paid as tort settlements or judgements also includes certain expenses—mostly lawyers' fees which are, in effect, deducted from a victim's settlement or award. Because fees are privately contracted between lawyers and their clients, we do not know what proportion of the present system's overall cost these expenses represent.

The other costs incurred by a plan are all costs, other than compensation, consumed in the delivery of compensation. These are costs directly incurred in settling and defending claims, and consist primarily of fees paid by the corporation to independent lawyers and claims adjusters.

The corporation's internal expenses (salaries of ICBC lawyers and claims adjusters, and internal administrative expenses) are excluded from our cost estimate of both the present and proposed plans since these expenses are relatively small and would probably remain about the same in either plan. Some members of the committee, however, believe these costs would be lower in the proposed plan.

The cost of making the coverage available to the public (marketing costs such as agents' commissions) have also been omitted in this evaluation since they, too, would be about the same under either system.

For the sake of comparison, we have used the year 1982 to estimate costs for both the present system and the proposed plan. Additional technical data used in arriving at the cost of the proposed plan are presented in Tables D.3 to D.5 of Appendix D. The cost of the present system is the estimated cost of benefits and expenses (already paid and likely to be paid in the future) incurred by the corporation from accidents that occurred during 1982.

The present system

The total cost of the present system for claims incurred from 1982 accidents is estimated to be $301 million (see Table 5.1 for details). Most of this amount (about 87.4 percent, or $263.2 million) would be paid under third-party liability coverage. The remaining 12.6 percent, $37.8 million, would be paid out under Part VII no-fault accident benefits, including weekly disability payments, medical and rehabilitation expenses, and death benefits.

Not all of the $301 million ends up in the hands of victims. The committee estimates that roughly 18 percent, about $55 million, would go directly to pay for the corporation's legal defence costs, for independent adjusters, and for government health programs. The remaining $246 million represents the total amount of payments made to victims: $217.5 million in tort judgements or settlements and $28.3 million in accident benefit payments.

The compensation obtained by victims through litigation is further reduced by the legal costs they must pay. These costs are especially significant for victims of serious injury. We have no statistics for this reduction because, as we have said, legal costs are a private matter between lawyers and their clients. As indicated earlier, however, because of the contingency fee system, it is not uncommon that 20 to 35 percent (and sometimes more) is subtracted from a victim's settlement to pay his or her lawyer.

TABLE 5.1

Cost of Present Plan

Estimated for 1982

Total Cost of Claims	**$ Millions**	**%**
Third-party liability	263.2	87.4
Accident benefits	37.8	12.6
Total	301.0	100.0
Allocation of Funds		
Transfers to public health programs	13.8	4.6
Legal costs and loss adjustment expenses paid by the corporation (see Note)	41.3	13.7
Tort settlements and judgements paid directly to claimants (see Note)	217.6	72.3
Part VII benefits paid directly to claimants	28.3	9.4
Total	301.0	100.0

Note: Corporation-paid legal costs include only those of the defence and party and party costs. Other plaintiff's legal costs (lawyer's fees) are paid by plaintiffs and are, in effect, subtracted from their settlements or judgements.

Source: *Cost evaluation by the Automobile Accident Compensation Committee, 1983.*

The proposed plan

The total cost of the proposed plan, as estimated for 1982, is $287.8 million (see Table 5.2 for details). Of this, $271 million would go directly to victims. About two-thirds of this cost, $178 million, would be paid to accident victims, regardless of fault. The remaining third, $93 million, would be used to compensate innocent victims for their non-economic losses and to pay claims resulting from accidents occurring outside the province, in which B.C. motorists are found at fault.

TABLE 5.2

Cost of Proposed Plan

Estimated for 1982

No-Fault Coverage	**$ Millions**	**%**
Income replacement	117.4	40.8
Death benefits		
Survivor's pension	28.7	10.0
Lump sum benefits	3.3	1.1
Care and rehabilitation and other expenses	27.1	9.4
Other benefits	1.4	.5
Sub-total	177.9	61.8
Residual Liability Coverage		
Non-economic losses	83.4	29.0
Accidents outside B.C.	9.9	3.4
Sub-total	93.3	32.4
Total cost of benefits	271.2	94.2
Legal and loss adjustment costs paid by the corporation	16.6	5.8
Total	287.8	100.0

Source: *Cost evaluation by the Automobile Accident Compensation Committee, 1983.*

Because tort liability would remain for non-economic losses, the corporation would still have to pay for the defence of contested non-economic loss claims. This cost would be about $17 million. Furthermore, of the $93 million paid under residual liability coverage, not all would be received by victims. Some portion would go to pay legal fees incurred by the victims themselves in order to get this part of their compensation.

The proposed plan compared to the present system

As shown in Table 5.3, it is estimated that the cost of the plan proposed by the committee (and as described in the previous section) would be about $13 million less than the present system: $288 million compared to $301 million. In the proposed plan, however, all victims (including those who now only receive Part VII benefits) would receive in total about $25 million more than in the present plan—that is, $271 million as opposed to $246 million. This would be achieved by balancing the increased amount victims receive on a no-fault basis with savings in several areas.

TABLE 5.3

Cost Comparison Between the Proposed Plan and the Present System

Estimated for 1982

	Proposed		Present	
Cost of Benefits	**$ Millions**	**%**	**$ Millions**	**%**
No-fault	177.9	61.8	28.3	9.4
Third-party liability	93.3	32.4	217.6	72.3
Sub-total	271.2	94.2	245.9	81.7
Other Costs				
Transfers to public health programs (see Note)	—	—	13.8	4.6
Legal and loss adjustment expenses paid by the corporation	16.6	5.8	41.3	13.7
Sub-total	16.6	5.8	55.1	18.3
Total	287.8	100.0	301.0	100.0

Note: These transfers are based on the fault principle—i.e., public health programs recover the expenses incurred by automobile victims who have been successful in suing a motorist insured by ICBC.

Source: *Cost evaluation by the Automobile Accident Compensation Committee, 1983.*

The cost of no-fault benefits in the proposed plan would be $150 million greater than the cost of the far less substantial Part VII benefits currently provided.

The most significant savings, approximately $124 million, would result from the removal of economic losses from the tort system and the restriction of the right to sue for non-economic losses to seriously injured victims.

The other major savings, about $25 million, would result from a reduction in the amount of legal costs and loss adjustment expenses currently paid by the corporation. These costs, currently amounting to $41 million, would be reduced to about $16 million because of the decrease in the number of lawsuits. Some legal costs would remain because accidents outside of B.C., as well as some non-economic losses, would remain in the tort system.

The final area of savings, about $13.8 million, would result from the cessation of transfer payments to government health programs currently made to cover certain accident-related costs, such as hospital, medical, and ambulance bills. Since these payments are based on tort settlements, they would no longer apply under the new plan. The savings to the insurance fund would not represent a real savings to society since these costs would still have to be met from other sources. This might be offset, however, by possible savings in other government services.

In conclusion, we believe it is possible to design an economically feasible compensation system based on the no-fault principle. Under the proposed plan, victims as a whole would receive more compensation, and motorists would pay no more for premiums than they do today. This more equitable distribution of the insurance fund would be achieved primarily by significantly reducing the legal costs incurred in disputing claims, and by greatly reducing what we believe to be the large number of unwarranted settlements for pain and suffering provided in relatively minor or insignificant injury cases.

In short, the plan we propose would cost about the same as, or less than, the present system.

5.4.4 COST OF THE INTERIM RECOMMENDATIONS

Some of the interim recommendations we propose to improve the present system—pending the possible later institution of more major reforms—would have little or no cost implications. Those recommendations that would create significant additional costs are addressed below.

Minimum liability limits

If, as we recommend, the compulsory liability limit is increased, motorists who currently carry less than the new limit would have to pay a higher premium than they do now. Each individual's increase would depend on his or her specific rate classification. Table 5.4 presents the extra premiums currently charged for additional limits for the two most common rate classifications—private passenger vehicles used for pleasure only and vehicles used for commuting to work.

The increased premiums that would be paid by those motorists who currently have lower limits would not, however, totally cover all of the higher settlement costs that would result from instituting a higher limit of compulsory third-party coverage. For example, raising the minimum limit to $300,000 would increase the cost of uninsured motorist claims by about $2.1 million—which would be an additional cost representing about 0.7 percent of the present system's total cost. Raising the minimum limit to $500,000 would increase the total cost by about $3 million, or roughly one percent.

Some committee members believe that raising the minimum limit from $100,000 to $300,000 or $500,000 may also have an effect on all claims. When the public in general (and the legal profession and courts in particular) become aware that all victims have access to these much higher limits, it may contribute to an inflation of expectations on the part of all victims, even those with smaller claims. This impact on costs, however, is difficult to predict.

TABLE 5.4

Premium For Optional Third-Party Liability Coverage

Greater Vancouver, 1983

Third-Party Liability Limit	Vehicle Used For Pleasure Only	Vehicle Used to Drive to Work
	$	$
Basic Coverage (Note 1)	306 (Note 2)	383
Premium for Extended Coverage		
$		
200,000	13	16
300,000	18	22
500,000	23	29
1,000,000	34	43
2,000,000	62	78
3,000,000	94	118
5,000,000	119	149
10,000,000	153	191

Note 1: The basic coverage provides for $100,000 in third-party liability coverage plus no-fault benefits.

Note 2: With the Claim-Rated Scale, most policyholders receive a 35 percent discount on their rates, some receive less of a discount, and some pay more.

Source: *1983 ICBC Rate Manual*.

Accident benefits—care and rehabilitation

Removing the present $100,000 ceiling on no-fault care and rehabilitation benefits would mostly benefit those victims who are seriously or catastrophically injured. We estimate that the added cost of having no limit on these benefits would be about $4.2 million, or slightly above one percent of the total cost of the present system for the 1982 base year.

Accident benefits—wage and death benefits

No-fault wage and death benefits currently amount to $100 per week. The cost of raising this amount to $135 (a first step in the committee's recommended plan to gradually raise these benefits to their original relationship with the average B.C. wage—which would currently put them at $175) would be about $9.6 million, or about 3.2 percent of the present system's total cost. Of this amount, $7.9 million would be for additional weekly disability payments and $1.7 million for weekly death benefits.

Conclusion

Most people accept the fact that they need insurance to protect themselves from various risks, but many resent having to pay for it. Since in any one period the majority of those insured do not experience the claiming process, many feel they are paying out money and receiving nothing in return. And when they deal with a large insurance corporation, whether a private one or public one like ICBC, they may well feel alienated by its bureaucracy. This alienation is aggravated if the company does not provide the services to which people feel they are entitled.

Insurance is not always perceived as serving an essential societal purpose. But that is precisely what it should do. Insurance is an institution that allows individuals in a community to protect themselves by pooling their resources. The exact nature of this protection, however, must respond to changes in the nature of risks insured and changes in society's priorities.

When it was first established, automobile insurance seemed to fit in naturally with the fault system, where liability insurance was combined with the negligence principle that had emerged in the previous century. The motor vehicle was a new invention and there were few of them on the road. The fault system was designed to protect property owners and entrepreneurs who developed and promoted new inventions—and for that matter, the pioneer consumers who dared to use them. The greatest risks from automobile accidents in the beginning were thought to be the property damage they might cause and the cost of repairing the cars themselves. Bodily injuries were not initially viewed as a serious risk.

But times have changed. As the injury risks of driving automobiles became more apparent—with vastly increased numbers of accidents and injuries—society has responded by introducing, and then gradually modifying, automobile insurance for bodily injury. Change is appropriate to the insurance system because it has a responsibility to respond to new priorities. And the priority today is the well-being of the victims of automobile accidents.

The majority of this committee believe that the only way to provide automobile accident victims with truly compassionate, just, prompt, and secure compensation is through a first-party no-fault system for economic losses.

To quote again from Mr. Justice Dickson in one of the Supreme Court of Canada's Trilogy decisions:

> The subject of damages for personal injury is an area of the law which cries out for legislative reform. The expenditure of time and money in the determination of fault and of damage is prodigal. The disparity resulting from lack of provision for victims who cannot establish fault must be disturbing. [Andrews v. Grand and Toy Alberta Ltd. ((1978), 83 D.L.R. (3d) 458 (S.C.C.) at page 458)]

To meet new needs, the insurance system has been changed before. It is time to do it again.

Appendices

APPENDIX A

Highlights from Surveys of Public Attitudes

A.1

PUBLIC ATTITUDES TOWARDS COMPENSATION FOR BODILY INJURY RESULTING FROM AUTOMOBILE ACCIDENTS

(Phase 1—Exploratory Research)

Report: October 1980

Prepared for: **Automobile Accident Compensation Committee**
Vancouver, B.C.

Prepared by: **ABM Research Ltd.**
Toronto, Ontario

BACKGROUND

The Automobile Accident Compensation Committee is in the process of considering alternatives to the system now in place for providing compensation for bodily injury resulting from automobile accidents. Specifically, the desirability of a system whereby responsibility is not a factor in compensation assessment, rather than the current fault liability system, is being investigated.

A decision was made to consult the general public before recommending any changes, to determine their attitudes towards the current system and towards alternatives and improvements to it. A public attitude survey has therefore been designed to examine the following areas of concern:

- awareness of the provisions of the current system for compensation of bodily injury incurred in automobile accidents
- strengths and weaknesses perceived in the current system
- possible improvements to the current system
- preference between alternative solutions suggested for different accident situations

The design of the survey involves two phases. The first of the two phases is an exploratory phase to investigate attitudes towards components within the current system among individuals who have had experience of the system. The second of the two phases is a definitive phase to determine attitudes towards alternative solutions to key compensation scenarios among the public in general.

This report deals with findings from the initial, exploratory phase of research only.

OBJECTIVES

The specific objectives of the initial, exploratory phase of research were, among individuals with recent experience of settling bodily injury claims:

- to explore awareness of and attitudes towards the current claiming process for compensation for bodily injury resulting from automobile accidents
- to explore awareness of and attitudes towards the current system for assessing compensation for such injuries
- to explore attitudes towards the amount, and nature of compensation received and towards the method of receiving compensation under the current system
- to explore the feelings of claimants in general towards the current system, and their views on ways in which the system might be improved.

The purpose of exploring these areas of concern was to assist in developing hypotheses about possible improvements to the current system and thereby derive a series of alternative solutions to key compensation scenarios for quantification in the subsequent definitive phase of research.

METHOD

The method of this initial, exploratory phase of research consisted of a total of twenty-four interviews with individuals who had suffered bodily injury in an automobile accident, and had had a claim settled in the year preceding interviewing. The individuals interviewed were selected to represent a broad spectrum of claimants. A wide age spread and a range of types of injury were covered among men and women,

some of whom had had recourse to the legal system and some of whom had not. This was achieved by setting quotas within claim classifications. Within each of four classifications of claim—minor, moderate, severe and major loss—the following parallel quotas were set:

3 male claimants
3 female claimants
3 who had sought legal advice
3 who had not sought legal advice
3 under 35 years of age
3 aged 35 or more

In addition, the method involved a further twelve interviews with family members of individuals who had suffered bodily injury in an automobile accident, and had had a claim settled in the year preceding interviewing. In the case of these interviews, only three claim classifications were covered—moderate, severe and major loss—with two male family members and two female family members being interviewed in each category.

The interviews were conducted in a relatively unstructured way, with an interview guide being used rather than a detailed questionnaire. The respondents were therefore given a maximum of freedom to express their emotional reactions towards the claiming system as they had experienced it, and to express their resultant attitudes. The interviewers' task was therefore to ensure that all of the relevant topics were covered and to provide encouragement to the respondents in expressing their views.

The respondents were first asked to describe in their own words the circumstances of the accident in which they were involved and the nature and effects of the injuries they sustained. Then for each of the claiming process, the assessment of compensation and the payment of compensation as separate issues, the respondents were asked to describe, in their perception, what took place and to express their feelings towards these events. Finally, overall attitudes were probed. A copy of the interview guide used by the interviewers is included as an appendix to this report.

The interviews took place in the Greater Vancouver area between September 4 and September 10, 1980.

IMPORTANT: When reading this report, it should be borne in mind that the findings are derived from a relatively small number of individuals who were not selected randomly and who therefore are not representative in a statistical sense of all claimants. Moreover, the interview technique employed is one which, because of its lack of structure, can provide a depth of understanding which is at the same time however, imprecise. The findings should therefore be viewed as hypotheses rather than as factual evidence. The subsequent quantitative phase of research will demonstrate the extent to which these hypotheses are valid.

HIGHLIGHTS

- There appears to be a general lack of knowledge among I.C.B.C. claimants of the process for claiming compensation for injuries sustained in car accidents, and a number of criticisms of the process, as currently practised, appear to be made. The main criticisms are of perceived attempts by I.C.B.C. to rush settlements in the early stages of a claim; unsympathetic adjusters; perceived favouring of the "guilty" party in an accident; harrassment by investigators; perceived inhumanity of the examination for discovery; and perceived distastefulness of the bargaining procedure used in the final stages of a claim. While not all claimants are critical, those who appreciate the system appear to be individuals with smaller rather than larger claims, who find their adjusters sympathetic and friendly, and who feel that they received fair compensation quickly.
- Again, there appears to be a lack of knowledge of the method used to assess the amount and nature of compensation to be given, with little, if any, information on the components of the final compensation offered being supplied to claimants. Among those claimants who have difficulty demonstrating that they are free from responsibility for the accident in which they are involved, resentment may be experienced when the amount of compensation offered is apparently reduced as a result of their responsibility. There

may also be some fear that lawyers may occasionally act in their own self-interest rather than in the interest of the claimant. Even those claimants who obtain what they believe to be a fair and speedy settlement may be concerned about the position of those who are less capable of working aggressively for a fair compensation or who do not retain a lawyer to do this for them.

The ideal method of paying compensation may be to provide for medical expenses and lost income on a regular basis throughout the time of medical treatment, rather than providing a single lump sum payment at the end of the treatment period. The provision of a reassurance that any future medical expenses and lost income resulting from later complications will also be covered, may be more important than the provision of compensation for pain and suffering.

- Although a number of the criticisms made by claimants of the current system might theoretically be eliminated by a move to one which does not involve establishing responsibility for injuries in an accident, there appears to be a general perception that the tort system is fair and that those who are responsible for accidents should not receive the same amount of compensation as those who are free from any responsibility. The criticisms made by claimants appear to be directed, therefore, to the practice rather than to the principle of tort insurance.
- Attitudes towards the way in which accident claimants should be compensated may vary depending on the type of claimant—driver in a two-car accident, driver in a single-car accident, passenger or pedestrian—and on the amount of responsibility and cause of responsibility—whether there are any mitigating circumstances or whether any illegal action was taken. These variables should therefore be taken into consideration—together with various types of compensation and the issue of whether or not responsibility for the accident should be established—when designing the second phase of research to determine public attitudes in general.

A.2

PUBLIC ATTITUDES TO COMPENSATION FOR BODILY INJURIES INCURRED IN AUTOMOBILE ACCIDENTS

Report: June 1981

Prepared for: **Automobile Accident Compensation Committee**
Vancouver, B.C.

Prepared by: **ABM Research Ltd.**
Toronto, Ontario

BACKGROUND

The Automobile Accident Compensation Committee was established in British Columbia to consider improvements to the system of automobile insurance in place in that province.

The Automobile Accident Compensation Committee considered that the general public should be consulted to establish public feelings and attitudes towards the issues involved. These could then be taken into account, together with other aspects of the committee's work, when specific recommendations are made in the committee's final report.

ABM Research Ltd. was invited to conduct some consumer research, and, after meetings with the A.A.C.C. a two phase research plan was adopted. The first phase consisted of depth interviews with recent claimants for compensation for personal injuries in automobile accidents, both to obtain information on the perceived strengths and weaknesses of the current system and to help structure a questionnaire for the second, quantified stage. The findings of phase 1 have been reported upon separately. This document sets out the findings from the second phase of research.

OBJECTIVES

The objectives of phase II of the research were:

- To establish the awareness of the provisions of the current system of compensation for bodily injuries sustained in automobile accidents.
- To establish the public's perception of the types and levels of compensation for individuals involved in accidents, given differing levels of responsibility for those accidents.
- To determine under what circumstances lump sum payments for pain and suffering should be made and how the level of such payments should be assessed.
- To establish the reasons behind attitudes towards specific compensation issues:
  —the extent to which compensation should be equal irrespective of responsibility for an accident.
  —the method of payment for compensation intended to provide for future income loss and future care.
  —the need for lump sum payments for pain and suffering.
- To establish whether the public believes cases should be closed permanently upon settlement.

METHODOLOGY

A total of 501 personal in-home interviews were conducted amongst adults aged 18 years and over throughout the province of British Columbia. Since automobile insurance issues affect all members of the public, no qualification criteria on driving habits or existing insurance coverage were used. The results have been analysed by these various segments but the sample population does represent the general public.

Interviews were conducted throughout the province to ensure the opinions obtained were representative of the whole population, not just inhabitants of large cities. A modified form of proportional sampling was used, with census enumeration areas (E.A.s) used as the primary sampling units in cities over 500,000. E.A.s were selected with probability proportionate to population, that is an E.A. with twice the population of another would have twice the chance of

being selected. Then, by conducting a fixed number of interviews in each selected E.A., each household is given an equal probability of inclusion. For a selected E.A., the interviewer is issued with a map with a starting point marked: from there, the interviewer is instructed to follow a prescribed route (or block) to complete the required number of interviews. Call-backs were not conducted if no reply was received at a house: since all interviewing was conducted in the evenings and on weekends, younger people, males and full-time working women were assured of being represented.

In areas with population centres of less than 50,000, all such centres were listed and a sufficient number selected to represent the province: some judgment was used in selecting smaller centres with reasonable access for interviewers. Having chosen such towns, start points were selected from telephone directories, and the same block interviewing system employed as in the larger centres.

Quotas were imposed to ensure that half the sample was male and half was female and that a reasonable age spread was obtained. From data available from Statistics Canada, the resulting age, sex and city size cells were weighted to bring them in line with the true profile of the British Columbia population.

A copy of the questionnaire and field materials used can be found in the appendix, together with copies of the actual and weighted sample data.

REPORT FORMAT

A summary of highlights from the study follows this introduction. The detailed findings are then presented and discussed in greater detail, with tables illustrating points in the text where appropriate. More detailed tables can be found in the appendix, together with the sample structure and copies of the questionnaire and field materials. Full computer tables are available separately.

HIGHLIGHTS

- Awareness of the compensation awarded to individuals who have sustained personal injuries in automobile accidents under the current B.C. system is very limited. Between a third and a half of the public do not know whether any compensation is paid to a particular individual in a particular accident situation.
- The vast majority of the general public in B.C. (80%) believe that the person responsible for an accident should not receive the same type or level of compensation as the person who is not responsible for an accident. This response is illustrated in both direct questioning and throughout the scenarios, where "guilty" drivers are treated more harshly than "innocent" drivers.
- Degrees of responsibility also appear to have an effect on the compensation the public believes to be appropriate. For minor accidents, those with mitigating circumstances, or those with dual responsibility, treatment of the guilty party is less harsh than in cases involving one evidently guilty party or those involving impairment.
- Public sympathy supports the idea that compensation should be linked to responsibility since it is a "fairer" way to administer the system, it is believed morally desirable to attach some penalty or punishment to causing an accident and that increased knowledge of the existence of such a system would act as a deterrent to careless driving.
- Whilst the same desire for differential treatment extends to compensation for widows of men killed in accidents, when one driver was impaired and the other free from blame, it does not extend to the children of men killed in such accidents. The vast majority would *not* differentiate between the compensation awarded to children on the grounds that they have no responsibility for their parents' actions.
- The idea of a lump sum payment for pain and suffering is supported, although most people would prefer selective use of this form of compensation. Only a very small number of respondents typically judge this to be an appropriate form

of compensation for the individuals in the accident scenarios that were presented. It would appear to be a payment associated only with the "innocent", not with persons responsible for an accident.

- Given that lump sum payments for pain and suffering are to be awarded, an independent panel is the preferred method for assessing the amount of the award. However, both the legal system and the fixed schedule of payments are supported by more than a quarter of the sample. This suggests that the assessment method should be reviewed since the current method is not necessarily perceived to be the fairest method.

  If these type of payments are made, the majority feel they should be in all cases of injury not just limited to instances where permanent disability results from an accident. However, it is accepted that the amount awarded should vary according to the nature and severity of the injury.

- There is no doubt that the public wish to see the issue of reopening a case upon injury recurrence addressed. At the very least, it is felt that claimants should have the option of settling for a smaller award initially, with the ability to reopen the case if necessary. Only 8% believe a case should be permanently closed upon settlement.

- In cases where there is a need for payments to cover *future* care or *on-going* income loss, the great majority of the public favour payments as costs are incurred or in installments. If lump sum payments are made to cover these eventualities, the public believes the money will be, at worst, misspent or, at best, not be sufficient to provide for essential care and services that may not have been foreseen at the time of settlement. Respondents believe payments on an installment basis will best provide for the injured person over time.

- Responses to all these issues are mirrored in reactions to the compensation appropriate for selected individuals in particular accident scenarios. Throughout these scenarios, there is more sympathy for *all* involved in the accidents from:

—older people
—city dwellers
—respondents who have experience of a personal injury claim via I.C.B.C.

In contrast, younger people and residents of small communities tend to be harsher in their attitudes towards those responsible for accidents. The exception is in the case of lump sum payments for pain and suffering: younger respondents do tend to perceive these as more appropriate payments throughout.

- When impairment is involved, attitudes do harden against the driver responsible for an accident, even when the driver himself is rendered permanently disabled.
- Approximately half the B.C. public believe that compensation should be reduced if seat belts are not being worn. A reduction of between 10% and 50% is considered reasonable.
- There is a preference for actual income replacement or actual expense payment rather than weekly allowances or limited payments for the innocent parties in an accident. The less generous limited payment or allowance is seen as more appropriate for those responsible for accidents.

CONCLUSION

This study does indicate that the B.C. public would prefer an insurance system which takes the issue of responsibility into account in determining the amount of compensation to be paid. This underlines the very real need for explanation to and education of the general public, if there is a decision to change the basis of the insurance system in B.C. away from the current fault liability system and towards one of equalising compensation, irrespective of responsibility.

A.3

RECIPIENTS' ATTITUDES TOWARDS LARGE LUMP SUM SETTLEMENTS AWARDED AFTER AUTOMOBILE ACCIDENTS

Report: August 1981

Prepared for: Automobile Accident Compensation Committee
Vancouver, B.C.

Prepared by: ABM Research Ltd.
Toronto, Ontario

BACKGROUND

The Automobile Accident Compensation Committee was mandated to review the performance of the present tort liability system as it compensates victims of automobile accidents.

One of the areas of interest to the committee related to the effectiveness of the lump sum system as a way of providing compensation. More specifically, the committee was interested in knowing how the money received from large tort settlements or judgements was used by the claimants. The committee felt that, on occasion, such funds are not used wisely, giving rise to financial problems for severely injured people later in their lives.

The research was conducted in order to understand how settlement monies are invested and spent, and claimants' views on alternate ways of providing compensation, such as structured compensation.

OBJECTIVES

The primary objectives of the research were to determine:

1. How victims managed their lump sum settlements.
2. Claimants' attitudes towards alternate ways of providing compensation, such as installment payments.
3. Claimants' attitudes towards the amount of compensation received.

The secondary objectives of the research were to determine:

1. Claimants' attitudes towards the claim process.
2. Claimants' attitudes towards their legal representation.
3. Claimants' attitudes towards their dealings with ICBC.

METHOD

This research was based on 17 personal interviews conducted among victims of serious injuries who received from ICBC large lump sum settlements or judgements as a result of automobile accidents which occurred between 1974 and 1978. The interviews were conducted during the period between June 16 and July 8, 1981.

Respondents were selected from a list provided by ICBC. With the exception of one who received $75,000, all were recipients of lump sums in excess of $100,000. At the time of the interviews, all claims were settled. The interviews were conducted in the respondents' homes though one was conducted at a respondent's work place and one at an hotel.

The interviews started with a review of the claimant's situation prior to the accident (financial, physical, employment and lifestyle, etc.). Then followed a description of the accident and the nature of the injuries and a review of the claimant's situation after the accident.

The interviewees were then asked to comment on the claim process, the handling of their claim, the method of assessment of damages, the amount and adequacy of the compensation received, their legal representation and legal fees, their dealings with ICBC, the use of the money received and their preference for lump sum versus installment payments.

Prior to the interviews, the respondents were told that the interviews were to remain confidential to the committee and they were encouraged to express their views and feelings freely.

This survey cannot be considered statistically representative of the opinions of all recipients of large settlements. It is an in-depth qualitative study of the attitudes and feelings of a small group of individuals toward their own personal experience following an automobile accident.

HIGHLIGHTS

Use of Lump Sum Awards

1. Most recipients of large lump sum settlements appear not to set out to squander their money. Some who may not appear to deal wisely with their money do not do so out of a wish to squander it, but because they might lack advice and skill or might simply be unlucky.
2. Most seem to feel they have invested their award in the best way they could but few actually admit openly that they are being successful. Some appear reluctant to share their experience and some tend to be unwilling or unable to assess the relative success of their investments. Several admit having lost in various investments. And there is a sense that some who have been successful feel that the security of their investments is not assured.
3. The most popular investments appear to be houses and real estate property. Other common items of investment tend to be term deposits and cars or vans. Some claimants interviewed go on trips, others invest in stocks, precious metals and furniture for the home.
4. Most claimants interviewed would not appear to have sought, or think of seeking, professional help or advice on investments; nor are they offered any. Advice, if any, tends to come mostly from parents, other relatives or friends. Several claimants interviewed, especially those who feel unsuccessful in their investments, express the view, in retrospect, that investment counselling should be made available by ICBC as part of their rehabilitation programme.

Lump Sum Versus Installment Payment

1. For most claimants, the choice between lump sum and installment payments appears to be a matter of personal preference. Most of those interviewed tend to agree that the method of installment payment is preferable for those who are incapable of handling money—that is, people other than themselves.
2. Most of those interviewed appear to feel they are able to

manage their own award. They claim to prefer a lump sum payment for themselves because of the opportunities, independence and security it is perceived to provide. Several, however, claim they would prefer installment payments, or installment payments along with a lump sum because this alternative is perceived as providing better security, is easier to handle and combines the psychological and emotional benefits of receiving a lump sum with the perceived economic benefit of continuing financial provision.

Attitudes Towards the Claim Process

1. Claimants disapprove of the claim process. For the majority it is a most difficult and painful experience. Many must endure extreme financial hardship during the process, being forced to spend their savings and liquidate their personal assets.
2. Claimants do not feel protected by the insurance system. For most, the examination of discovery is a humiliating, upsetting and useless experience making them feel 'guilty' of the injury. Claimants do not feel treated like persons.
3. All agree that the process is too long. Most do not understand the reason for the delays and perceive the whole system to be wasteful and too expensive.

Attitudes Towards Lawyers

1. Dealings of claimants with their lawyer appear to vary considerably, and their attitudes tend to be dependent on their age, education and socio-economic profile. Many claimants claim to be satisfied with the work performed by their own lawyer. These feel their lawyer was competent, put in a lot of work and would keep them informed of the progress of their case. Several others, however, express dissatisfaction and resentment because of a feeling of being taken advantage of and insufficient interest on the part of the lawyer.
2. On the issue of the lawyer's fees, the majority of claimants interviewed agree that they are too high. They feel that the fee charged, even among those claimants

expressing satisfaction with the lawyer, does not reflect the work done and is excessive in relation to the injury suffered and the settlement received.

3. Claimants do not appear to agree on the issue of whether lawyers are necessary in the process. Some of those interviewed think that they are not really needed, are expensive and slow down the process. Others, on the contrary, think that ICBC cannot be trusted. They express a desire to be protected and guided through a process that is perceived as too complex to understand for the average person.

Attitudes Towards ICBC

1. Throughout the claim process, ICBC appears to be perceived negatively by the claimants interviewed. Most claimants express dissatisfaction with the claim adjuster. Their feeling appears based on a perceived lack of communication, interruption of no-fault payments and an atmosphere of adversary relations.
2. ICBC tends to be perceived as being in conflict with the claimant, taking the side of the wrongdoer who caused the injury. Claimants interviewed would express the feeling that ICBC is inhumane and uncaring. The expectations and desire of claimants tend to be that ICBC should play a more socially responsible role.

Adequacy of Compensation

1. Most claimants interviewed claim not to be satisfied with the compensation received. Claimants are worried about their future and fear the recurrence of the injury. The claimants interviewed all expressed the view that nothing can compensate for the injury. Several victims interviewed admit to being 'dazzled' at first by the large sum of money awarded to them. However, many claim to regard the amount as insufficient, subsequently.
2. For most victims, no-fault benefits appear not to provide an adequate relief. The amount of weekly benefits is reported to be too low and some claimants interviewed complain that payments are often stopped without notice.

APPENDIX B

No-Fault in Other Jurisdictions

THE QUEBEC PLAN

Automobile accident insurance in Quebec is administered by the Regie de l'assurance automobile du Quebec. Implemented on March 1, 1978, the plan covers all residents of Quebec and their dependants when injured in an automobile accident, regardless of who is at fault. This guarantee of protection, provided under the province's Automobile Insurance Act, replaces the right to take any legal action to recover injury losses.

While the Quebec plan is an example of pure no-fault, it is a "basic" plan only; that is, it covers only a basic amount of loss. The act permits insureds to purchase "supplementary" plans that provide no-fault insurance to cover losses (higher incomes, in particular) beyond those indemnified under the basic plan.

Victims who are covered

If an accident occurs in Quebec, the owner, the driver, and any passenger of a Quebec registered car are deemed to be residents and are fully covered.

In the case of a car registered outside of Quebec, non-residents involved in an accident within the province are compensated to the extent that they are not at fault. In effect, the no-fault system permits non-residents to obtain the same percentage of compensation that they were previously entitled to under fault, but not the full benefits to which Quebec residents are entitled. The Quebec authority administering the plan is empowered to take legal action to recover from a non-resident who is deemed to have been a wrongdoer any costs paid out as compensation to injured parties.

When Quebec residents are injured in an automobile accident outside the province, they are eligible for the same benefits as if the accident had happened in Quebec. In such

situations, the provincial authority is also empowered to take legal action in other jurisdictions to recover its compensation costs. Furthermore, a victim is entitled to sue for additional losses to the degree permitted under the laws of the jurisdiction where the accident occurred. In other words, the act is written to provide residents with no-fault benefits but not so that they or the Quebec plan will be put at a disadvantage in situations where the fault system remains in effect outside of the province.

Increase of benefits with inflation

All amounts payable under the plan are adjusted annually to accommodate inflation. This provision automatically protects the economic value of the benefits provided. (The specific dollar amounts cited below are for the 1982-83 fiscal year.)

Discretion in the payment of compensation

Most of the benefits of the plan are provided as they are needed or in the form of a pension. This may be replaced, however, by periodic payments or a lump sum in order to promote rehabilitation, or to close the case of either a non-resident or a victim who ceases to be a resident, or when periodic payments are so minimal as not to warrant continued administrative maintenance.

Limitation of application for benefits

The right to apply for compensation is limited to a period of three years after the accident, manifestation of injury, or death. The authority administering the plan can extend the deadline if a victim was prevented from seeking compensation due to extraordinary circumstances.

Income replacement indemnity

Because Quebec's income replacement (IR) indemnity is available to other than wage-earners—including children, persons at home, the elderly, and so on—it should actually be considered a disability indemnity. Children, for example, do not normally incur a wage loss before they have joined the labour force. But they are, nevertheless, covered by the

income replacement indemnity. This indemnity is meant to cover the miscellaneous expenses and services required by the family or others who care for injured victims.

Amount of indemnity

The basic wage indemnity covers 90 percent of the net income lost by victims, subject to a weekly minimum of $130.45, plus $16.31 for each dependant. In calculating the net income, the gross income of a victim is considered, up to a maximum of $29,000.

1. Full-time workers

   Victims employed full time are entitled to receive the IR pension. The pension is equal to 90 percent of the net income derived from such employment. Another amount must be determined if a victim establishes that he or she would have held a more remunerative employment but for exceptional circumstances.

2. Unemployed, part-time-casual employed, employed in family business, or person at home

   Victims fitting into this category are eligible for the IR indemnity if they are unable to perform the employment that they could have held on a regular and full-time basis. This presumptive employment is determined by taking into account the victim's qualifications, experience, and physical and intellectual capacities.

3. Students

   Students are defined as full-time students at the secondary or post-secondary level, aged 16 or older. A student is eligible if unable to pursue studies because of the accident. The IR indemnity is determined as follows:

   If a victim was employed at the time of the accident or would have been employed but for the accident, the IR indemnity is based on the income earned from that employment for as long as it would have been held. After that period, the victim becomes entitled to the minimum pension.

   If a victim is delayed from entering the labour market because of the accident, the IR indemnity is revised for that period and is based on a gross income equivalent to the average weekly wage if the victim was in the post-secondary level or 75 percent of the average weekly wage if the victim was in the secondary level.

Victims who return to their studies but are incapable of holding a job because of the accident are entitled to an IR indemnity based on a gross income equivalent to the average weekly wage.

4. Minor children without employment

   Victims below the age of 16 are considered minors, and are eligible for the IR indemnity if unable to engage in ordinary occupations of their specific age group. The IR pension is equal to the minimum pension until the age of majority. From the day of majority, victims are entitled to the IR indemnity if unable to work because of an accident. Their gross income is deemed to be equivalent to 75 percent of the average weekly wage.

5. Persons at home

   Victims in this category are entitled, instead of the income replacement annuity, to the reimbursement of expenses incurred as a result of disability, up to a maximum of $244.58 per week.

6. Persons already unable to work at the time of an accident due to a disability

   The IR is equal to the minimum indemnity.

7. Victims over the age of 65

   Under age 70, the original IR indemnity is payable for 5 years. Under age 75, it is payable until the age of 75; over 75, it is payable for one year. After any of these periods, the IR indemnity, if required, continues until death, and at the rate of the minimum indemnity.

Indexing

All pensions are indexed to inflation. The maximum insurable earning, also indexed, is set each year at 150 percent of the average weekly wage in Quebec. This figure has been selected so as to cover the earnings of the vast majority (approximately 80 to 85 percent) of the population.

Benefit reductions

An IR pension is reduced for an individual by any amount of a pension payable to him from the Quebec Pension Plan, Old Age Security, or Workers' Compensation.

Return to employment

If a victim returns to employment, the indemnity ceases. If, by reason of the injury the income is less than the income

actually earned or estimated before the accident, the indemnity is only partially reduced.

Relapse

If through relapse, a victim suffers a disability, the IR indemnity is payable based on the gross income at the time of the accident.

Death Benefits

The plan provides two types of benefits to survivors: pensions and lump sum payments.

Surviving spouse and dependants

A spouse is entitled to a life pension equal to 55 percent of the IR pension to which the deceased victim would have been entitled. The amount payable is subject to a weekly minimum of $130.45, plus $16.31 for a single dependant.

For additional dependants, the survivor's pension is increased by ten percent for the first, and by five percent for each additional dependant, up to a maximum of 90 percent.

A spouse without children and under the age of 35 receives the survivor's pension for a maximum of five years. Dependants other than the spouse are deemed dependants as long as they would have been dependants had the victim lived.

Surviving parent(s), but no dependants

A lump sum of $6672 is payable to the parents of a victim or persons acting in the capacity of parents.

No surviving parents or dependants

A lump sum of $3336 is payable to the victim's estate.

Medical and rehabilitation expenses

All reasonable expenses for care and rehabilitation are covered without limit to the extent that they are not already covered by a social security scheme.

Funeral costs

Funeral expenses are reimbursed up to a maximum of $2224.

Non-economic losses

Victims who sustain injury, dismemberment, disfigurement, pain and suffering, or loss of enjoyment of life, are

entitled to a lump sum indemnity prescribed by the plan's Table of Permanent Impairment. The sum varies according to the nature and extent of impairment (as specified by the table) and the victim's life expectancy. The maximum payable is $40,000.

Appeal procedure

Any victim can appeal the amount of compensation offered, or any other decision by the plan's administration. There are three levels of appeal:

1. The first level is internal and consists of a review of the case by technicians specialized in claims review. It is carried out by an adjuster (or adjusters) other than the one previously involved in the claim.
2. The second level is also internal and consists of an appeal to a claims review board made up of three members of the authority's management appointed to the board on a rotating basis.
3. The third level is external and consists of an appeal to the Social Affairs Commission, which is the same one that reviews appeals on workers' compensation claims. The commission is an administrative court made up of judges. Their decisions are final and cannot be appealed further.

THE MICHIGAN PLAN

The state of Michigan has eliminated the right to tort action for losses resulting from bodily injury in automobile accidents, except in cases where economic losses exceed the benefits provided by no-fault insurance or when non-economic losses exceed a pre-defined threshold.

Eligibility for no-fault benefits

Under this state's automobile insurance legislation, private insurers are required to provide no-fault benefits for accidents occurring within the state that involve an insured or members of his or her household, passengers, or pedestrians struck by a vehicle owned by an insured. In an out-of-state accident, only an insured, his or her family, and passengers are covered.

No-fault benefits for economic losses

Insurers are required to cover the following (figures cited are in U.S. dollars for the calendar year 1983):

Medical costs

Medical expenses are covered without limit.

Work loss

Victims who incur a loss of income as a result of an injury are entitled to the replacement of 85 percent of the gross income they derived from employment, up to a maximum of $2195 per month. (Figures quoted are in U.S. dollars.)

The victim is also entitled to replacement services of up to $20 per day. This is to cover expenses incurred in obtaining ordinary and reasonable services in lieu of those a victim would have performed but for the accident.

The wage indemnity is equal to approximately 140 percent of the average Michigan wage, but both it and the replacement services are only payable up to a maximum of three years. Non-wage earners are entitled to replacement services only.

Survivors' benefits

For loss of support and loss of services, the survivors of a deceased victim are entitled to an annuity for loss of support and loss of services of up to a maximum of $2195 per month for a duration of three years.

Funeral expenses

Funeral expenses are reimbursed up to a maximum of $1000.

Threshold for tort action

The threshold above which tort action is still permitted to recover non-economic losses is defined as follows:

> A person remains subject to tort liability for non-economic loss caused by his ownership, maintenance or use of a motor vehicle only if the injured person has suffered death, serious impairment of bodily function, or permanent, serious disfigurement.

In other words, the threshold requires significant bodily impairment before permitting the right to sue. Permanent disability and scarring qualify, but lesser injuries (such as minor whiplash or hairline fractures where there is complete recovery at an early date) do not. In practice, however, some types of minor injuries have been compensated, even if they were not permanent, because the words "serious impairment of bodily function" have been liberally interpreted.

Tort action is also permitted if an injury was caused intentionally or if economic losses exceed the limitations of the benefits paid under no-fault.

NO-FAULT IN OTHER U.S. STATES

As of July 1982, sixteen American states (and Puerto Rico as well) have no-fault plans that limit tort recovery in some fashion. In each of these states, the plan is a partial one, retaining the right to sue for both economic losses not covered by the no-fault plan and for non-economic losses if the injury, disability, or incurred expense is defined as going beyond a certain threshold.

In only three states (Florida, New York, and Michigan) is the threshold a verbal one. Michigan's threshold was quoted in the preceding section. The wording of the thresholds in the other two states is as follows:

Florida

In any action of tort brought against the owner, registrant, operator, or occupant of a motor vehicle . . . a plaintiff may recover damages in tort for pain, suffering, mental anguish, and inconvenience because of bodily injury, sickness, or disease arising out of the ownership, maintenance, operation, or use of such motor vehicle only in the event that such injury or disease consists in whole or in part of:

a) significant and permanent loss of an important bodily function.

b) permanent injury within a reasonable degree of medical probability, other than scarring or disfigurement.

c) significant and permanent scarring or disfigurement.

d) death.

New York

. . . in any action by or on behalf of a covered person against another covered person for personal injuries arising out of negligence in the use or operation of a motor vehicle in this state, there shall be no right of recovery for non-economic loss, except in the case of a serious injury, or for basic economic loss.

"Serious injury" means a personal injury which results in

death;

dismemberment;

significant disfigurement;

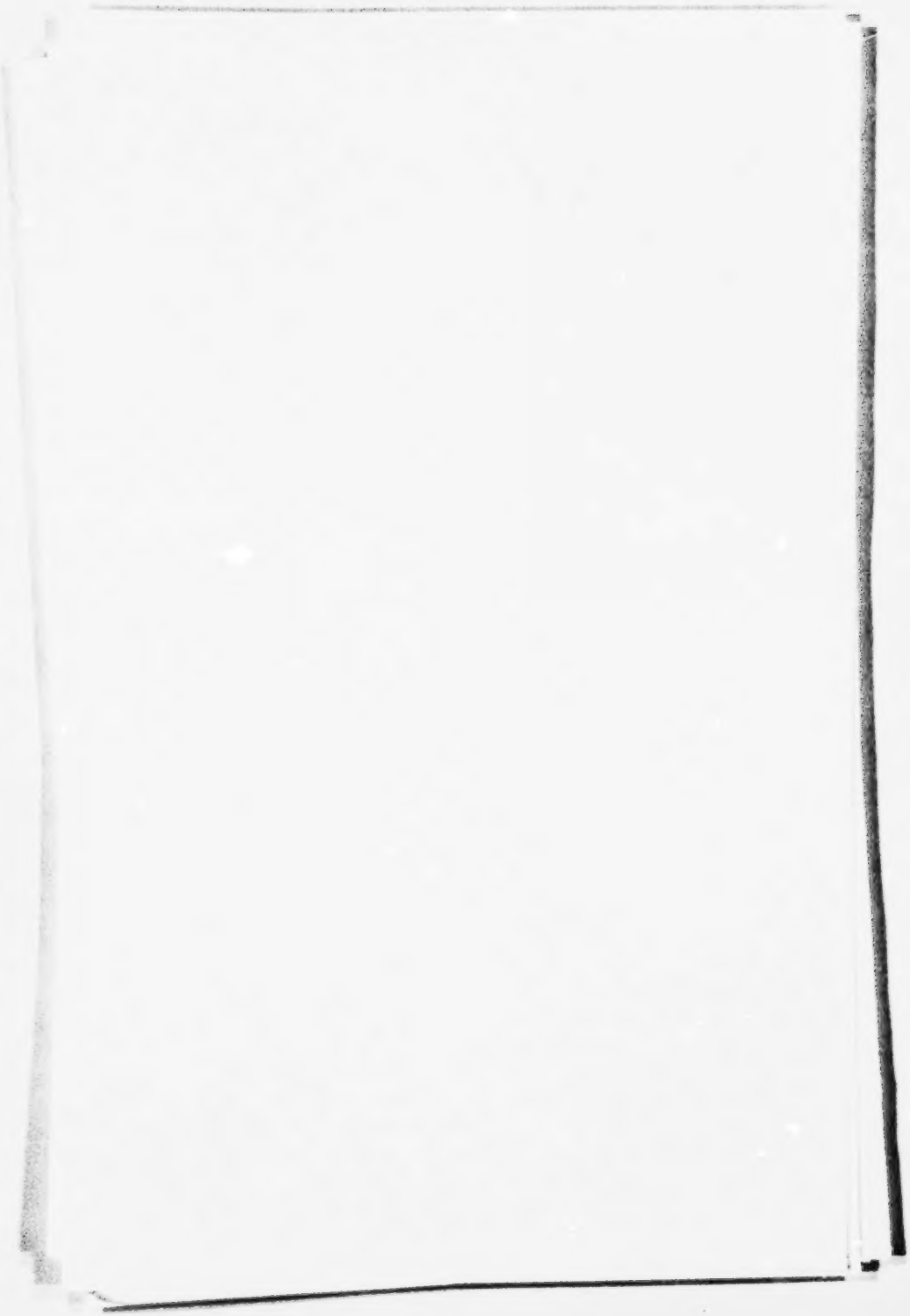
a fracture;

permanent loss of a body organ, member, function or system;

permanent consequential limitation of use of a body organ or member;

significant limitation of use of a body function or system;

or a medically determined injury or impairment of a non-permanent nature which prevents the injured person from performing substantially all of the material acts which constitute such person's usual and customary daily activities for not less than 90 days during the 100 days immediately following the occurrence of the injury or impairment.



APPENDIX C

Proposed Amendment to the Insurance (Motor Vehicle) Act

PROPOSED AMENDMENT TO THE INSURANCE (MOTOR VEHICLE) ACT TO PROVIDE AUTHORITY FOR PERIODIC PAYMENTS

241A (1)

In an action for damages arising out of the bodily injury to or the death of a person caused by the ownership, use or operation of a motor vehicle in which a judgement of a court has awarded damages to or for the benefit of an individual for or including loss of future income or loss of capacity to earn income, the court, on application of any party to the action, made within 30 days of the delivery of the judgement in the action, may, if it is satisfied that it is appropriate in the circumstances, order that all or any part of the judgement be replaced by an order providing for periodic payments.

241A (2)

In fixing the portion of the judgement that should be replaced by an order providing for periodic payments and in fixing the amount of these periodic payments, the court may have regard to :

(i) the present value of the loss of future income or loss of earning capacity contained in the judgement;
(ii) the effect of any liability or contributory negligence on the part of the person;
(iii) the amount of insurance available to the defendant;
(iv) the ability of the defendant or his insurers to make periodic payments;
(v) whether any portion of the judgement for pain and suffering or loss of amenities should be paid periodically;
(vi) in the case of death of a person, the economic loss suffered as a result of the death;
(vii) the amount required to supply immediate necessities;

(viii) the amount awarded for loss of income to the date of judgement;

(ix) payments that may have been made by or on behalf of the defendant prior to judgement;

(x) the legal fees and cost of the action in obtaining the judgement;

(xi) interest to the date of judgement;

(xii) any other circumstances that the court considers appropriate.

241A (3)

Unless the court orders otherwise, or the parties otherwise agree, periodic payments shall be made monthly.

241A (4)

On the anniversary of an order providing periodic payments, the periodic payments shall be adjusted by adding or subtracting to each payment in that year a sum to allow for inflation and such sum shall be a percentage increase or decrease based on the Consumer Price Index for the previous 12 months.

241A (5)

Periodic payments made pursuant to an order under this section shall cease on the death of the individual in respect of whom the order was made, unless at the time of judgement the court otherwise orders.

241A (6)

The court may order that security be given for the periodic payments, of a type or in a form approved by the court.

241A (7)

An assignment of or an agreement to assign any right to periodic payments contained in an order made under this section is unenforceable except to secure payment of alimony or maintenance for child support or both.

241A (8)

Periodic payments provided for in an order made under this section are exempt from garnishment, attachment, execution and any other process or claim to the extent that wages or earnings are exempt under any applicable law.

APPENDIX D

Technical Data on Cost Implications

TABLE D.1

Proposed Plan: Annual Amount of Income Replacement Annuity By Level of Gross Income and Family Situation

Estimated for 1983

Gross Income	Family Situation				
		Married			
	Single	No Children	1 Child	2 Children	3 Children
$	$	$	$	$	$
7,000	7,020	7,904	8,788	9,672	10,556
10,000	7,253	8,030	8,788	9,672	10,556
15,000	10,412	11,220	11,386	11,551	11,715
20,000	13,526	14,377	14,552	14,727	14,902
25,000	16,602	17,585	17,769	17,953	18,137
30,000	19,521	20,590	20,807	21,019	21,231
35,000	21,249	22,318	22,548	22,778	23,008
40,000	21,249	22,318	22,548	22,778	23,008

Source: *Cost Evaluation by the Automobile Accident Compensation Committee, 1983.*

TABLE D.2

Proposed Plan: Annual Amount of Survivors' Annuity By Level of Gross Income and Family Situation

Estimated for 1983

Gross Income	Family Situation			
	Spouse Only	1 Child	2 Children	3 Children
$	$	$	$	$
7,000	7,020	7,904	8,788	9,672
10,000	7,020	7,904	8,788	9,672
15,000	7,020	7,904	8,788	9,672
20,000	7,908	9,459	10,309	11,176
25,000	9,672	11,550	12,567	13,603
30,000	11,325	13,525	14,713	15,923
35,000	12,275	14,656	15,945	17,256
40,000	12,275	14,656	15,945	17,256

Source: *Cost Evaluation by the Automobile Accident Compensation Committee, 1983.*

TABLE D.3

Victims By Age and Sex

Estimated for 1982

1. Number of Victims Injured

Age Group	Male	Female	Total
Less than 5	55	42	97
5-14	339	255	594
15-19	1,646	802	2,448
20-24	1,803	939	2,742
25-34	1,693	1,176	2,869
35-44	835	838	1,673
45-54	638	778	1,416
55-64	409	594	1,003
65 or more	457	516	973
Total	7,875	5,940	13,815

2. Number of Victims Killed

Age Group	Male	Female	Total
Less than 15	33	22	55
15-17	39	17	56
18-24	164	49	213
25-34	83	27	110
35-44	40	18	58
45-54	36	19	55
55-64	26	20	46
65 or more	46	28	74
Total	467	200	667

Source: *Cost Evaluation by the Automobile Accident Compensation Committee, 1983.*

TABLE D.4

Victims Disabled Eight Days Or More

Estimated for 1982

1. Number of Victims by Occupation

Age Group	Male	Female	Total
Full-time employed	4,977	2,370	7,347
Unemployed/part-time and casual workers	1,969	2,899	4,868
Students	134	89	223
Children	772	564	1,336
Unable to work at time of accident	24	18	42
Total	7,875	5,941	13,815

2. Number of Victims by Duration of Disability

Age Group	Total
Disabled 8 days	13,815
Disabled 28 days	9,896
Disabled 13 weeks	4,675
Disabled 26 weeks	2,571
Disabled 52 weeks	1,166
Disabled 2 years	485
Disabled 3 years	294
Disabled 4 years	240
Disabled 5 years	203
Disabled 6 years	185

Source: *Cost Evaluation by the Automobile Accident Compensation Committee, 1983.*

TABLE D.5

Family Situation of Victims Killed

Estimated for 1982

Family Situation	Male	Female	Total
	Number of Victims		
Single person			
Without dependants	259	85	344
With dependants	2	1	3
Married spouse present			
Without dependants	71	36	107
With dependants	103	47	150
Married spouse absent			
With dependants	32	31	63
Total	467	200	667

Source: *Cost Evaluation by the Automobile Accident Compensation Committee, 1983.*

Glossary

Claimant

In this report, the word "claimant" is used only in the context of insurance. It refers to the individual or legal entity who has suffered an insured loss and requires indemnity from the insurer. Under third-party liability insurance coverage, the insured loss is the liability for injury to others as a result of the ownership or use of an automobile. In this situation, the claimant is the insured individual found legally liable for injury, also called the defendant.

Under the accident benefits coverage of Part VII of the regulations of the Insurance (Motor Vehicle) Act, a "claimant" is an insured who has suffered bodily injuries as a result of an automobile accident.

In the present system, the word "claimant" is often used to refer to the plaintiff seeking compensation from the corporation. In its report, the committee has adopted the narrower meaning of "claimant," and used the word "victim" when referring to anyone injured or killed in an accident.

Committee

The Automobile Accident Compensation Committee.

Compensation

The word "compensation" refers to the sum of money and the services or assistance that a victim receives following an automobile accident. For the purpose of this report, the committee has examined the compensation that is provided only by the Insurance Corporation of British Columbia.

Under the present system, compensation takes the form

of benefits paid by the corporation on a first-party basis under the accident benefits coverage; or settlements or court judgements paid by the corporation under the third-party liability coverage on behalf of the wrongdoer, under the Uninsured and Unidentified Motorist coverage, or under the Underinsured Motorist Protection option.

The word "reparation" is sometimes used in the report with the same meaning as compensation.

Compensation Fund

Sometimes referred to as "the fund," it is the total amount of money available from all the insurance premiums collected, from which victims of automobile accidents are compensated.

Compensation System

The words "compensation system" refer to the legal and administrative procedures set up to assess and deliver compensation to victims of automobile accidents. In this report, the words "present system" are also used to mean the "present compensation system." The basis upon which the present system operates is the principle of tort liability. The words "reparation system" are sometimes used in lieu of "compensation system."

Contingency Fees

Also known as contingent fees.

Corporation

The Insurance Corporation of British Columbia.

Defendant

In the context of the report, the word "defendant" is taken in its legal context and means the party against whom a legal action is brought for personal injury or death.

Economic Losses

The words "economic losses" refer to those damages incurred by a victim that are tangible and can be evaluated in

monetary terms. They are loss of earnings, expenses and cost of medical care and rehabilitation incurred by an injured victim, and loss of financial support incurred by the dependants of a deceased victim.

General Damages

In British Columbia, the words "general damages" refer to lost wages, costs of future care, and non-economic losses such as pain and suffering, loss of amenities, etc.

"General damages" is not used in this report; instead the committee refers to personal injury damages as being either economic or non-economic in nature.

Non-Economic Losses

The words "non-economic losses" refer to losses that are of an intangible nature—i.e., other than monetary. These include pain and suffering, loss of amenities or enjoyment, and loss of expectation of life.

In legal literature, non-economic losses are often referred to as "non-pecuniary" losses.

Plaintiff

The word "plaintiff" is used in the legal sense to mean the party bringing an action against a wrongdoer for personal injury or death. In the present system, the plaintiff is most often the victim of an injury or the dependants or relatives of a deceased victim.

Policyholder

In an insurance agreement, the "policyholder" is the individual or legal entity in whose name the insurance policy is issued. Most often, the policyholder is the insured named in the insurance policy.

Present System

In the report, the "present system" refers to the present compensation system.

Settlement

In this report, the word "settlement" refers to an agreement voluntarily reached by negotiation between the victim of a personal injury or that victim's legal representative and the insurance adjuster or the legal representative of the corporation acting on behalf of the wrongdoer. It also refers to the lump sum of money received by the victim as part of this agreement. The term "offer of settlement" refers to a specific recommendation by the committee, as discussed only in Part 5.

Special Damages

In this report, the words "special damages" refer to the sum of pre-trial loss of earnings or profits and expenses incurred as the result of an automobile accident. This particular definition does not apply in British Columbia, but is used here in the context of the Supreme Court of Canada's 1978 Trilogy decisions.

Structured Settlement

The term "structured settlement" refers to agreements or schemes for the payment on a periodic basis of the sum due to the victim as part or all of a settlement.

Victim

In the context of this report, the word "victim" refers to all those who are killed or injured as a result of automobile accidents, and their dependants, whether the accident was caused by their own fault or not, and whether they themselves were insured or not.

Wrongdoer

In the context of this report, the "wrongdoer" is the driver who caused an automobile accident and was found negligent. In legal literature, the wrongdoer is often referred to as the "malfeasor" or "tortfeasor."

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